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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-911

EDWARD E. KOEHL, Administrator of the Estate of Carol E. Koehl, Deceased,

HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased,

HENRY NEUHAUSSER, RONALD ISON, EDNA ISON SCOTT, JOHN A. MUSCOVIN, aka JON A. MUSCOVIN, and AMELIA MUSCOVIN,

Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE

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No. ....

EDWARD E. KOEHL, Administrator of the Estate of Carol E. Koehl, Deceased, et al.,
Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

Petitioners respectfully petition this Court for a Writ of Certiorari to review the final orders and judgments of the Supreme Court of Ohio entered on September 13, 1979 dismissing their appeal without opinion and denying their Motion for an order directing the Court of Appeals for the First District of Ohio to certify its record to the Supreme Court of Ohio which is appended hereto on pages 2a and 3a of the Appendix.

The Opinions of the Court of Appeals of the First District of Ohio were returned on October 14, 1975 and December 2, 1977, were not reported, and are appended hereto in the Appendix, PP. 4a and 59a respectively.

The application of the Petitioners to Reconsider was denied by the Court of Appeals on November 7, 1975, without opinion, and is appended hereto on P. 19a of the Appendix.

The jurisdiction of this Court to consider the Federal Constitutional issues is conferred by *Title 28, Section 1257(3) U.S.C.* which is appended hereto on P. 1a of the Appendix.

QUESTIONS PRESENTED FOR REVIEW

(1) Does a State Court violate Due Process rights guaranteed to litigants by the Fourteenth Amendment to the United States Constitution when it renders judgment in a civil case where there has been no trial, evidentiary hearing, or any other final submission of the case to it?

(2) Can such violation of basic Constitutional rights by granting a judgment without a trial be disregarded because the State Appellate Courts to which the case was appealed hold that while the proceedings were clearly erroneous, the result reached by the Trial Court was correct?

(3) Does the failure of the State Trial Court thereafter to conduct an evidentiary hearing and consider evidence proffered by the Petitioners violate Article VI of the United States Constitution to the effect that the Constitution shall be the supreme law of the land binding on judges in every state?

CONSTIITUTIONAL PROVISIONS INVOLVED

(1) *Fourtenth Amendment, Section 1 to the United States Constitution* is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) *Article VI of the United States Constitution* is as follows:

> ". . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . ."

The manner in which the rights guaranteed to the Petitioners under the foregoing provisions of the United States Constitution were raised in this case as follows:

(1) Motion for New Trial and/or to Vacate Judgment of the Petitioners in the Court of Common Pleas of Hamilton County Ohio on behalf of each of the Petitioners requesting the Trial Court to set aside and vacate the judgment entered on May 29, 1973 to the Respondent, United States Fire Insurance Company, and to grant a new trial for the following reasons and grounds:

> "(1) Error of the Court in entering said judgments without a trial being held in the case." . . . .

> "(9) The judgments are contrary to Section 1 of the Fourteenth Amendment to the United States Constitution and in violation of the rights of the Plaintiffs guaranteed by the United States Constitution."

The Motion of the Muscovins states as to Ground No. 9 that the judgments are "in violation of the rights of the Defendants guaranteed by the United States Constitution."

(2) Memorandum in Support of Motion For a New Trial and to Vacate Judgments filed in the Court of Common Pleas of Hamilton County, Ohio in which it is claimed that "the Fourteenth Amendment to the United States Constitution guarantees to a citizen of the United States and the state wherein he resides 'due process'."

> Excerpts from this Memorandum are appended hereto on P. 66a of the Appendix.

(3) Assignment of Error No. 6 by Petitioners on first appeal to the Court of Appeals for the First Appellate District of Ohio from judgments entered by Judge Matthews which is as follows:

> "(6) Violation of the rights of Plaintiffs-Appellants under Article I, Section 14 of the United States Constitution."

(4) Opinion of the Court of Appeals for the First Appellate District of Ohio dated October 14, 1975 appended hereto on P. 4a of the Appendix.

Special attention is called to PP. 8a and 9a of the Appendix in which the Court states that one of the issues is whether Petitioners "were denied due process in the procedure adopted by the trial court."

Also, P. 10a of the Appendix where the Court stated:

> "We believe the Plaintiffs-Appellants were unjustifiably denied the right to have the issues raised in their Supplemental Complaint tried to a jury."

> ". . . the foreclosure of a jury trial amounted to a deprivation of *substantial* rights." (Emphasis — The Court's).
>
> ". . . We purposely refrain from referring to the remand as one for a new trial in view of our belief that the Plaintiffs-Appellants received *no* trial below and did not waive same." (Emphasis — The Court's)

(5) Plaintiff's Reply Memorandum in the Court of Common Pleas of Hamilton County, Ohio on the Second Hearing before Judge Frank M. Gusweiler after remand in which the Petitioners stated that since due process had been denied them by the rendition of a judgment without a hearing or notice, the judgments rendered were void.

Consequently, the Trial Court on remand was under an obligation to consider the matter ab initio and to refrain from following an unconstitutional remand.

Excerpts from this Memorandum are appended hereto on P. 68a of the Appendix.

(6) Reply Brief of Petitioners in the Court of Appeals for the First Appellate District of Ohio on the Second Appeal.

In this Reply Brief, Petitioners again claim that the proceedings in the Court of Common Pleas of Hamilton County, Ohio in which judgment was rendered against them without trial or hearing are void and invalid under the Fourteenth Amendment to the United States Constitution. They further claim that Judge Gusweiler of the Court of Common Pleas of Hamilton County, Ohio, to whom the case was remanded after the First Appeal, was under an obligation to hear the case ab initio, and to disregard an unconstitutional remand. Article VI to the United States Constitution was cited as authority.

Excerpts from this Reply Brief of Petitioners are appended hereto on P. 71a of the Appendix.

(7) Memorandum in Support of Jurisdiction filed by Peti-

tioners in the Supreme Court of Ohio. On P. 18 of this Memorandum, Petitioners stated:

> "There is no authority in the law, and it is contrary to the *Fourteenth Amendment of the United States Constitution* and *Article I, Section 16 of the Ohio Constitution* to have *affirmed a judgment not based on 'due process'.*" (Emphasis Ours)

On P. 21 of this Memorandum, Petitioners stated.

> "*Article VI of the United States Constitution* requires the Trial Judge to whom the case was remanded after the first appeal to have complied with the Constitution of the United States and conducted a fully evidentiary hearing on these cases without regard to the limitations imposed by the Court of Appeals. *Article VI of the United States Constitution* provides:
>
> > '. . . this Constitution and the Laws of the United States which shall be made in pursuance thereof and all Treaties made or which shall be made under the Authority of the United States, shall be the *supreme Law of the Land; and the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the Contrary notwithstanding.*' (Emphasis Ours)"

(8) Notice of Appeal to the Supreme Court of Ohio in which it was stated by Petitioners:

> "This case involves a substantial constitutional question concerning namely the Fourteenth Amendment of the United States Constitution and Article I of the Ohio Constitution, and is of public or great general interest."

STATUTES INVOLVED

Rule 38, Ohio Rules of Civil Procedure
Rule 39, Ohio Rules of Civil Procedure
Rule 54(B), Ohio Rules of Civil Procedure
Section 3929.06 O.R.C.

STATEMENT OF THE CASE

The cases of the Petitioners involve identical questions. Petitioners Edward E. Koehl, Administrator of the Estate of Carol E. Koehl, deceased; Henry Neuhausser, Administrator of the Estate of Stephen Neuhausser, deceased; Henry Neuhausser individually; Ronald Ison and Edna Ison Scott, his mother, recovered judgments as plaintiffs in the Court of Common Pleas of Hamilton County Ohio against Jon Allan Muscovin, a minor and Amelia C. Muscovin, his mother. The judgments were for wrongful death of the intestates, expenses, serious personal injuries to Ronald Ison and medical expenses of Edna Ison Scott.

Thereafter, in order to satisfy these judgments in accordance with Ohio law, they all filed their Supplemental Petitions against the Respondent, United States Fire Insurance Company as Defendant who had issued an automobile liability insurance policy to Jon A. Muscovin and Amelia Muscovin as named insureds. Jury trials were demanded. The cases were consolidated for trial and assigned to Judge William R. Matthews of the Court of Common Pleas. The parties entered into a partial stipulation which set forth the United States Fire Insurance Company's policy of insurance. There was no provision in the stipulation that it contained all the evidence.

Subsequently, without notice, hearing of any kind, trial, pending motion or setting, Judge Matthews wrote an Opinion deciding the case in favor of the United States Fire Insurance

Company and ordered counsel to prepare entries in accordance therewith. He refused to entertain any objections, denied motions to set cases for trial and entered judgments for the United States Fire Insurance Company on May 29, 1973.

These cases were thereafter appealed by Koehl, Neuhausser, Ison and Scott to the Court of Appeals for the First Appellate District of Ohio. Jon Muscovin and Amelia Muscovin also appealed and the cases were consolidated for hearing on appeal. On October 14, 1975, the Court of Appeals sustained the Assignments of Error "which challenged the trial court's judgments entered without trial", holding "the foreclosure of a jury trial amounted to a deprivation of *substantial* rights". (Emphasis – The Court's)

However, the Court of Appeals agreed that the interpretation of the contract by the Trial Court was correct "predicated upon the bare record before it", but on October 14, 1975 remanded the case to the Trial Court for the sole consideration of another issue. It ordered the Trial Court to consider whether the policy had been varied by representation and oral agreement of the agent.

On remand before Judge Frank Gusweiler of the Court of Common Pleas, all parties filed Motions for Summary Judgment. The Plaintiffs and the Muscovins attached four Affidavits of English Professors to their motions relating to the correct interpretation of the written policy. No counter affidavits were filed by the United States Fire Insurance Company. The Court sustained the motions of the United States Fire Insurance Company and denied the counter motions, and entered judgment on December 2, 1977 in favor of the United States Fire Insurance Company.

An Appeal was again taken to the Court of Appeals for the First Appellate District of Ohio claiming as error the violation of rights under the Constitution of the United States. On hearing, the Court again wrote an opinion affirming the judgment of the Trial Court holding that the matter had been ajudicated on the First Appeal and could not be reconsidered

by either it or the Trial Court and on March 21, 1979 entered judgment accordingly.

On further appeal, the Supreme Court of Ohio on September 13, 1979 dismissed the appeal of the Petitioners "for the reason that no constitutional question exists", and overruled their Motion For an Order Directing the Court of Appeals to Certify Its Record.

John A. Muscovin and Amelia Muscovin join as Petitioners in these proceedings.

STATEMENT OF FACTS

Carol E. Koehl, Stephen Neuhausser, Ronald Ison and John A. Muscovin were all minors attending Aiken High School at Cincinnati, Ohio.

On January 26, 1967, the automobile belonging to Carol E. Koehl's father, which she had taken that morning with her to Aiken High School, Cincinnati, Ohio, was thereafter driven by John A. Muscovin, and Carol E. Koehl, Stephen Neuhausser and Ronald Ison were passengers therein. John Muscovin negligently and carelessly operated the automobile on January 26, 1967, colliding with a tree, resulting in the death of Carol E. Koehl and Stephen Neuhausser, and serious personal injury to Ronald IIson.

It is undisputed that Muscovin did not have consent or permission to drive the Koehl automobile.

Thereafter, judgments were recovered by the Plaintiffs-Petitioners against John Muscovin and his mother, Amelia Muscovin, who had signed his application for a driver's license. After recovery of the judgments, Supplemental Petitions were filed by the Petitioners in accordance with *3926.06 O.R.C.* against the United States Fire Insurance Company who had issued a policy of automobile liability insurance to John Muscovin, the driver, and Amelia Muscovin, his mother, as insureds. A copy of 3926.06 O.R.C. is appended on P. 80a of the Appendix.

This policy carried a clause which Petitioners claimed made it liable for accidents which occurred to their insureds while using a non-owned automobile. On the other hand, the Respondent claimed that there was no coverage unless such automobile was driven with the consent of the owner.

Consequently, the dispute between the parties related primarily to the meaning of this clause and its applicability to this case. This clause is as follows:

> "Persons Insured. The following are insureds under Part 1:
> (a) with respect to the owned automobile.
>   (1) the named insured and any resident of the same household.
>   (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
>   (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;
> (b) with respect to a non-owned automobile,
>   (1) the named insured,
>   (2) any relative, but only with respect to a private passenger automobile or trailer,
>   provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and
>   (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above."

As pointed out in the Statement of the Case, the Trial Court prematurely, without notice and without trial, evidentiary hearing, pending motion, setting, or other submission sua sponte decided the case by its written Opinion in favor of the Respondent, United States Fire Insurance Company and against the Petitioners.

Thereafter, the Petitioners raised their objection in the Trial Court, and later in the Court of Appeals on two occasions and in the Supreme Court of Ohio. They claimed the proceedings of the Trial Court were void and invalid because they were lacking in due process and foreclosed them from offering evidence in support of their claim. Subsequently, this evidence which consisted of the Affidavits of four outstanding and learned professors of English in the local colleges and universities was proffered in the second proceedings of the Trial Court. These professors unanimously agreed that the ordinary and grammatical meaning of the policy made the Respondent liable to the Petitioners, and the consent of the owner was not required.

In dispute was the question of whether or not the consent of the owner of the automobile was required for coverage of the insureds by the United States Fire Insurance Company in the operation by John Muscovin of a non-owned automobile. Typical of the four Affidavits by these grammarians is the Affidavit of Dr. Siegmund A. E. Betz, Chairman of the English Department of Edgecliffe College setting forth his opinion, attached hereto on P. 73a of the Appendix, which was presented by the Petitioners in support of their Motions for Summary Judgment.

On the First Appeal, the Court of Appeals agreed with the Petitioners that they had been denied "due process" and their day in Court by the entry of judgments without a trial or hearing. However, as pointed out in the Statement of the Case, the Appeals Court agreed with the Trial Court as to the interpretation of the policy, and remanded the case solely on the issue of whether the written language in the policy had been varied by the representations of Respondent's agent who sold it.

The Court of Appeals in the second appeal held the trial court properly failed to consider these Affidavits of the English professors on the ground that the law of the case rule applied on the issue of the interpretation of the written language of the policy. This is the principle of law that holds that after an Appellate Court has enunciated a principle of law in a particular case, this principle is binding on all of the parties and cannot be varied, but must be followed by both the Appellate Court and the Trial Court, even though such case has not been finally adjudicated and is still pending. However, the Ohio Courts do not recognize this rule.

The Ohio Appellate Courts thereby failed to give effect on two occasions to their own determination that the proceedings in the Trial Court were in effect invalid because of lack of due process. The Ohio Supreme Court by dismissing Petitioners Appeal and Motion to Certify is in accord.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

1. DOES A STATE COURT VIOLATE DUE PROCESS RIGHTS GUARANTEED TO LITIGANTS BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT RENDERS JUDGMENT IN A CIVIL CASE WHERE THERE HAS BEEN NO TRIAL, EVIDENTIARY HEARING, OR ANY OTHER FINAL SUBMISSION OF THE CASE TO IT?

It is undisputed that the Petitioners were denied "due process" when the original judgment against them and in favor of the United States Fire Insurance Company was entered. There had been no trial setting, no Motions for Summary Judgment filed, no trial, no waivers of jury, no final argument, and no submission of the case to the original Trial Court.

When the matter was subsequently brought to the attention of Judge William R. Matthews of the Court of Common Pleas, the original Trial Judge, after he had announced his decision against the Plaintiffs by way of Motions to Set Case for Trial, he made amazing statements which are set forth on P. 5 of the Narrative Statement of the Proceedings:

> ". . . that he had decided the cases on the merits and he was denying the Motion to set the cases for trial, that he felt that he had done his work, had studied the memoranda, read the law, made a decision and written an opinion to which he was holding, even though mistakenly premature, which he was affirming."

The Court of Appeals on P. 7 (P. 10a of Appendix) of its decision of October 14, 1975 agreed that the Plaintiffs had been deprived of "substantial rights" and further wrote:

> "We purposely refrain from referring to the remand as one for a new trial in view of our belief that the Plaintiffs-

> Appellants received *no trial* below and did not waive same". (Emphasis Ours)

The Court of Appeals further pointed out on P. 7, (P. 10a of Appendix) of this Opinion:

> "We believe the plaintiffs-appellants were unjustifiably denied the right to have the issues raised in their supplemental complaints tried to a jury. Although during oral arguments plaintiffs-appellants categorized the action of the trial court by refusing to schedule the subject matters for trial as procedural errors, we conclude that the judgments awarded below, without a trial, denied to plaintiffs-appellants more than their *procedural* rights; the foreclosure of a jury trial amounted to a deprivation of *substantial* rights. Those assignments of error which challenge the trial court's judgments entered without trial have merit and are sustained. . . . We purposefully refrain from referring to the remand as one for a new trial in view of our belief that the plaintiffs-appellants received *no* trial below and did not waive same." (Emphasis — The Court's)

In its Opinion of March 21, 1979 on the Second Appeal to the Court of Appeals attached hereto on P. 20a of Appendix the Court stated on P. 5 (P. 23a of the Appendix) that it had sustained the Assignment of Error of the Appellants with respect to the fact that they:

> "were denied due process in the procedure adopted by the Trial Court in its disposition thereof."

This Court has held that the failure to accord "due process" to a litigant violates the Fourteenth Amendment to the United States Constitution, and such judgments are absolutely void, *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413; *Armstrong* v. *Manzo*, 380 U.S. 545.

The *Restatement of the Law: Judgments, Section 6* provides:

> "A judgment is void unless a reasonable method of notification is employed, and a reasonable opportunity to be heard afforded to all persons affected."

Also, *Restatement of the Law: Judgments, Section 6(F)* provides:

> "Even though the Court has jurisdiction over the Defendant, and even though he is given notice of the action, a judgment against him is void if he was denied an opportunity to be heard."

2. CAN SUCH VIOLATION OF BASIC CONSTITUTIONAL RIGHTS BY GRANTING A JUDGMENT WITHOUT A TRIAL BE DISREGARDED BECAUSE THE STATE APPELLATE COURTS TO WHICH THE CASE WAS APPEALED HOLD THAT WHILE THE PROCEEDINGS WERE CLEARLY ERRONEOUS, THE RESULT REACHED BY THE TRIAL COURT WAS CORRECT?

A JUDGMENT NOT BASED ON DUE PROCESS IS A NULLITY.

The Court of Appeals is in error in its declaration in its second decision that its prior decision dated October 14, 1975, attached hereto on P. 15a of the Appendix sustaining the judgment of Judge William R. Matthews, Trial Judge, arrived at without trial, evidence, or "due process" should have been appealed to the Ohio Supreme Court.

It is likewise in error in its determination that in the absence of an appeal, the judgments of the Court of Common Pleas and the Court of Appeals were adjudications, and Petitioners were barred from again asserting their right to a trial at which evidence would have been presented by them. It should be borne in mind that the cases were still pending on another issue for the determination of which it was remanded to the Trial Court.

A void judgment or decree is an absolute nullity and need not be appealed. It can be disregarded at any time, *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413; *Armstrong* v. *Manzo,* 380 U.S. 545.

Even a preliminary order cannot be issued by a Court without a pre-judgment hearing. Thus, the issuance of a Writ of Replevin without such hearing is absolutely void and is not remedied by the fact that bond must be posted to cover any injury which might result from an erroneous order, *Fuentes* v. *Shevin,* 407 U.S. 67.

An unconstitutional judgment can be inquired into at any time, *Ex Parte Siebold,* 100 U.S. 371, in which Syllabus No. 1 is as follows:

> "The appellate jurisdiction of this court, exercisible by the writ of habeas corpus, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not."

The fact that the same result would have been reached if "due process" had been followed because the Defendant had no defense is not a valid reason for denying such "due process", *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413.

The Court of Appeals had no jurisdiction to affirm the judgment of the Court of Common Pleas entered without an evidentiary hearing, notice, trial by jury as requested in the Complaints, and without "due process".

In addition, in the interest of expediency, bifurcated or fragmented appeals are not looked upon with favor by the Courts. They only increase the work of the Court and do not ultimately determine the case, *Whitaker-Merrell Co.* v. *Geupel Constr. Co.,* 29 Oh. St. (2d) 922; *Linz* v. *Linz,* 33 Oh. App. (2d) 174.

Moreover, the Ohio Court of Appeals was not warranted in making the remand which it did. The Ohio Supreme Court has held that after an Appellate Court finds error and reverses a judgment it should not pass on other errors assigned which were not necessary to the decision or opinion.

In *Middleport Woolen Mills Company* v. *Titus,* 35 Oh. St. 253, 258, the Ohio Supreme Court stated:

> "The view that we have taken of this case renders it unnecessary that we should determine the important questions discussed by counsel, or express any opinion as to the real merits of this case in any particular."

There are other cases which hold that an Appellate Court should not render an opinion on matters not before it, or which are not necessary for the decision of the Court. Thus, in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364 this Court held that where there had been a lack of a full and fair hearing in the tribunal below which had not afforded the petitioner an opportunity to be fully heard and to present his evidence, the tribunal on remand from the Supreme Court, must start anew and permit a full and complete trial of the entire issue. In this case, the tribunal was the National Labor Relations Board.

It is a well recognized rule that obiter dictum is not binding on either courts or litigants, *Carroll* v. *Lessee of Carroll,* 57 U.S. 275; *Pacific Steamship Co.* v. *Peterson,* 278 U.S. 130. The rule is the same in Ohio Courts, *Ecker* v. *City of Cincinnati,* 52 Oh. App. 422, 426, 3 N.E. (2d) A14; *State* v. *Brunswick,* 69 Oh. App. 407, 421, 91 N.E. (2d) 1553.

3. DOES THE FAILURE OF THE STATE TRIAL COURT THEREAFTER TO CONDUCT AN EVIDENTIARY HEARING AND CONSIDER EVIDENCE PROFFERED BY THE PETITIONERS VIOLATE ARTICLE VI OF THE UNITED STATES CONSTITUTION TO THE EFFECT THAT THE CONSTITUTION SHALL BE THE SUPREME LAW OF THE LAND BINDING ON JUDGES IN EVERY STATE?

JUDICIAL DISCIPLINE DOES NOT JUSTIFY VIOLATION OF BASIC CONSTITUTIONAL RIGHTS

Petitioners proffered competent evidence on remand. It should be emphasized that on remand of these cases to the state Trial Court, Petitioners presented the Affidavits of four outstanding and learned professors of English of the local universities in support of their Motions for Summary Judgment which the Trial Court denied.

The Court of Appeals in its second Opinion of March 21, 1979 attached hereto on P. 20a of the Appendix held that the Trial Court was bound by the remand and could not consider the Affidavits of the grammarians proffered by the Petitioners in support of their Motions for Summary Judgment stating:

> "He had no choice but to accept as the controlling law of the case that the only interpretation that could be placed on the subject language was that which the Court of Appeals had decided in affirming the interpretation given by the judge before whom the matter originally had come. For Judge Gusweiler to have held that the interpretation of the policy language was undecided would have been untenable."

In so doing, the Ohio Court of Appeals disregarded the Ohio case law on the subject to the effect that there is no law of the case principle in Ohio and the Court may always correct an error. *New York Life Ins. Co.* v. *Hosbrook*, 130 Oh. St. 101; *Kern* v. *Contract Cartage Co.*, 55 Oh. App. 481; *Green* v. *Acacia Mutual Life Ins. Co.*, 98 Oh. App. 101; *Ross* v. *Cincinnati Transit Co.*, 105 Oh. App. 327.

The error which the Court of Appeals had made which it should have corrected on the second appeal was to reject the evidence which was proffered, but not considered on the remand and holding that the interpretation of the insurance policy involved in this case was governed by the decision in *Bright* v. *Ohio Casualty Co.*, 444 F. (2d) 341 which interpreted a similar clause without the benefit of support testimony or reference to any authorative book of English grammar. An Affidavit to this effect was attached to Petitioners' Motion for Summary Judgment.

OHIO CIVIL RULE 54(B) MAKES DECISION SUBJECT TO CHANGE OR REVISION

Also, the decision of the Trial Court made on July 10, 1972 which it journalized in its Judgment Entries of May 29, 1973 attached hereto on PP. 39a-51a of the Appendix was not a final order and was subject to modification at any time until the entry of a judgment adjudicating all the claims, rights and liabilities of all the parties.

There was still pending the question of whether the insurance policy had been modified by the representations and conversations of the insurance agent of the United States Fire Insurance Company which the Court of Appeals remanded to the Trial Court.

Ohio Rule 54(B) of Civil Procedure which is attached hereto on P. 65a of the Appendix expressly provides in the case of multiple claims, unless the Court finds "that there is no just reason for delay", the determination of fewer than all the claims shall not terminate the action and the order or decision is subject to revision at any time before the Entry of Judgment of final adjudication. There is no such finding in the Judgment Entries rendered by Judge William R. Matthews.

UNITED STATES CONSTITUTION IS CONTROLLING IN STATE COURTS

Article VI of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

In view of the clear language, there is no dobut that the State Courts are bound by the Constitution of the United States and are required to grant "due process" regardless of any state law or rules of court. This has been recognized by this Court on many occasions. The State Court must follow the United States Supreme Court decisions, *Sims* v. *State of Georgia,* 385 U.S. 538.

In *Commonwealth* v. *Rundle,* 201 A. (2d) 615, Aff. 204 A. (2d) 1446, the superior court of Pennsylvania stated:

> "Decisions of the United States Supreme Court, where relevant, are binding on all state courts and it goes without saying that we will follow such decisions even though they are in conflict with the law as determined by our own appellate courts."

EXPERT EVIDENCE SHOULD HAVE BEEN CONSIDERED

The Trial Court when it announced its decision originally on July 10, 1972 without evidentiary hearing or trial, and refused to grant a trial thereafter when requested by Petitioners based its judgment entirely on the case of *Bright* v. *Ohio Casualty Ins. Co.,* 444 F. (2d) 1341 (C.C.A. 6).

Similarly on the First Appeal to the Ohio Court of Appeals, the same case was the basis for its finding that there was no prejudicial error in failing to give Petitioners due process. In so doing, the Trial Court and the Ohio Court of Appeals not only violated the Constitutional rights of the Petitioners, but also were in complete error in determining such evidence might not have changed the result.

Affidavits of Dr. Siegmund A. E. Betz, Chairman of the Department of English of Edgecliff College, Cincinnati, Ohio, Dr. Ernest L. Fontana, Chairman of the Department of English of Xavier University of Cincinnati, Ohio, Dr. John P. McCall, Head of the Department of English at the University of Cincinnati, and Mrs. Marjorie T. Rouse, Assistant Professor of English at Northern Kentucky State University were presented by Petitioners in support of their Motions for Summary Judgment in the Trial Court on the second proceedings after the remand by the Ohio Court of Appeals.

They were precluded from presenting such evidence before Judge Matthews, the original trial judge, and these Affidavits were disregarded by Judge Gusweiler, the Trial Judge to whom the case had been remanded after the first appeal by the Ohio Court of Appeals.

The grammarians were all unanimous in their opinion that the United States Fire Insurance Company had, by the language of its policy, insured Petitioners, John A. Muscovin and Amelia Muscovin in the operation by John A. Muscovin of the non-owned automobile of Edward E. Koehl. No consent of the owner was required since he was the named insured in the policy.

The Affidavit of Dr. Siegmund A. E. Betz is attached hereto on P. 73a of the Appendix. It clearly illustrates that the pronoun "his" used in (b)(2) with respect to "a non-owned automobile" in a proviso clause requiring the consent of the owner should not ever apply to (b)(1) "the named insured" who was John A. Muscovin. It pointed out that the pronoun "his" was singular and could not have related to both the named insured, as well as "any relative" which requires a plural pronoun.

The decision in *Bright* v. *Ohio Casualty Ins. Co.*, 444 F. (2d) 1341, dealt with an entirely different policy, the insurance clause of which covered "persons insured".

> "(b) With respect to a non-owned automobile,
> (1) the named insured,
> (2) any relative, but only with respect to a private passenger automobile or trailer
> provided *the actual use* thereof is with the permission of the owner;" (Emphasis Ours)

In *Bright,* instead of the pronoun "his", the article "the" is used which entirely changes the meaning and construction of the policy. However, Petitioners were not allowed to present the expert witnesses to point this out before Judge Matthews who rendered the original or first judgment in the case nor after remand to the Trial Court.

Likewise, it was pointed out in the Affidavit of Dr. John P. McCall that the peculiar spacing in the policy issued by the Respondent had no significance whatsoever. His Affidavit in this regard noted:

> "Dr. McCall says that he has also observed and considered the peculiar spacing of the phrase commencing 'provided his actual operation * * *'. Spacing of print in such a document is an editorial activity, but does not have any specific significance for understanding the meaning of the passage in question. That is, there are no rules of English by which the interpretation of spacing can alter the ordinary meaning of the words that are written here. The particular spacing, in other words, does nothing to control the interpretation and meaning of the words that are actually used."

By Court decision, it is established law that where a person possesses special ability on a subject, he may testify as an expert and give his Opinion. This Rule has been adopted into *Rule 702, Federal Rules of Evidence* as follows:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Ohio Court have long followed this rule that expert testimony is admissible as to matters not generally within the common knowledge of laymen as illustrated by *McKay Machine Co.* v. *Rodman,* 11 Oh. St. (2d) 77, 228 N.E. (2d) 304 where a welder was permitted to give testimony as an expert. A more recent case to the same effect is *Ragone* v. *Vitale and Beltrami,* 42 Oh. St. (2d) 161.

It was pointed out in *21 Oh. Jur. (2d) 418, Sect. 410* that the reason for admission of the testimony of an expert is that:

> "He knows those things within the field of his specialty which the average man does not know."

Also, it was stated in this same reference, that an expert should be permitted to testify because from the nature of his calling he is:

> "better able to judge matters relating thereto than one not an expert."

The judgments against the Petitioners were entirely unwarranted according to the ordinary rules for the construction of contracts and insurance policies which was well stated in *Lytle* v. *Freedom International Carriers, S.A.*, 519 F. (2d) 129, 135 (C.C.A. 6), an Ohio case:

> "We are bound as well to follow the general rule of construction that a document is to be construed against the preparer of it and, as well, the more specific rule that ambiguities in insurance contracts are to be construed against the insurer and in favor of coverage. *Pennsylvania R. Co.* v. *Travelers Ins. Co.*, 226 F. (2d) 520 (6th Cir. 1955); *McNally* v. *American States Ins. Co.*, 308 F. (2d) 438 (6th Cir. 1962)."

The law is to the same effect in Ohio; as pointed out in *Mumaw* v. *Western and Southern Life Insurance Company*, 97 Oh. St. 1.

CONCLUSION

It should be evident that the Petitioners were not accorded due process in the Court of Common Pleas, Court of Appeals, and the Supreme Court of Ohio. The Ohio Court of Appeals twice made findings to this effect and these findings are beyond dispute. There was no evidentiary hearing, no trial, no setting, no oral arguments, no submission to the court, and no appearances of counsel to assist the court in arriving at the decision. The proceedings were entirely void and invalid.

Nothing that took place in this case could ever give such judgments lacking in due process any validity. The Petitioners were entitled to their day in Court which they never received.

This Court has pointed out that the denial of due process can never be justified by the fact that after trial and hearing the same result would have been reached. Petitioners submit that the same result should not have been reached had the Ohio Courts properly considered these cases. The Courts could not have concluded that there was no liability on the part of the United States Fire Insurance Company if they had considered the Affidavits of the four learned English professors which was not contraverted by any evidence proffered by the Respondent. They pointed out that the insuring agreement in this case was different from that in the *Bright Case* where the article "the" was used in the proviso clause instead of the pronoun "his".

More important, however, is the assumption by the Ohio Appellate Courts that inferior courts must follow a remand to the letter. They and the Respondent both contend an inferior court has no right to consider the merits of a cause, but must blindly follow the Appellate Courts even when "due process" has been denied. They argue it doesn't matter that a decision and judgment was entered without trial, evidentiary hearing, or submission to the court.

This premise is particularly dangerous in view of the fact that *Bright* v. *Ohio Casualty Company*, 444 F. (2d) 341 which was the basis of the interpretation of the insurance policy in this case represents the arbitrary construction of the English language by a court contrary to ordinary accepted grammatical meaning. Moreover, the opinion in *Bright* was rendered on November 15, 1971, the United States Fire Insurance Company policy was dated July 5, 1966, and the accident took place on January 26, 1967, all of which predated *Bright*.

To the contrary, Petitioners contend, important as it may be, judicial discipline must yield to the requirement of "due process". They contend there can be no justice unless a party is accorded "due process" which Daniel Webster defined as being "the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial", *The Dartmouth College Case*, 4 Wheaton 518, 581, 4 L. Ed. 514, 579.

Respectftully submitted,

ROSEN AND ROSEN
BY: HYMAN B. ROSEN
Attorneys for Edward E. Koehl,
Administrator of the Estate of
Carol E. Koehl, Deceased

BEALL, HERMANIES & BORTZ
BY: WALTER C. BEALL
Attorneys for Henry Neuhausser,
Administrator of the Estate of
Stephen Neuhausser, Deceased and
Henry Neuhausser

WAITE, SCHNEIDER, BAYLESS
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BY: STANLEY M. CHESLEY,
Attorneys for Ronald Ison and
Edna Ison Scott

WESSELMAN & RENNER
BY: RUSSELL W. RENNER
Attorneys for John A. Muscovin and
Amelia C. Muscovin

APPENDIX A

TITLE 28, SECTION 1257(3) U.S.C.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: September 13, 1979

No. 79-621

EDWARD E. KOEHL, Admr., et al.,
Appellants,

v.

JOHN A. MUSCOVIN, aka JON A. MUSCOVIN et al.,
Appellants,

UNITED STATES FIRE INSURANCE COMPANY,
Appellee.

APPEAL FROM THE COURT OF APPEALS
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the
Court this .... day of .... 19 ..
.... Clerk
.... Deputy

APPENDIX C

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 TERM
City of Columbus.) To wit: September 13, 1979

No. 79-621

EDWARD E. KOEHL, Admr., et al.,
Appellants,

v.

JOHN A. MUSCOVIN, aka JON A. MUSCOVIN et al.,
Appellants,

UNITED STATES FIRE INSURANCE COMPANY,
Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
for Hamilton County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Hyman B. Rosen.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the
Court this .... day of .... 19 ..
.... Clerk
.... Deputy

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Nos. C-73253, C-73271, C-73279

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased,

and

HENRY NEUHAUSSER,
Plaintiffs,

v.

JON ALLAN MUSCOVIN and AMELIA MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-73273, C-73276, C-73288

RONALD ISON, a minor, by and through his mother,
natural guardian and next friend, EDNA ISON SCOTT,
Plaintiff,

v.

JON ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-73274, C-73284, C-73289

EDNA ISON SCOTT,
Plaintiff,

v.

JON ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-73272, C-37277, C-73285

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, Deceased,
Plaintiff,

v.

JOHN A. MUSKOVIN, also known as
JON A. MUSKOVIN, and AMELIA C. MUSKOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

DECISION

(Filed October 14, 1975)

Messrs. Beall, Hermanies & Bortz, Walter C. Beall of counsel, 200 Dixie Terminal Building, Cincinnati, Ohio 45202, for Plaintiffs-Appellants, Henry Neuhausser, Administrator, and Henry Neuhausser,

Messrs. Rosen & Rosen, Hyman B. Rosen of counsel, 1005 First National Bank Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant, Edward E. Koehl, Administrator,

Messrs. Waite, Schindel, Bayless & Schneider, Stanley M. Chesley of counsel 1318 Central Trust Tower, Cincinnati, Ohio 45202, for Plaintiff-Appellant, Ronald Ison and Edna Ison Scott,

Messrs. Wesselmann & Renner, Russell W. Renner of counsel, 3526 Glenmore Avenue, Cincinnati, Ohio 45202, for Defendants-Appellants, Jon Allan Muscovin and Amelia C. Moscovin,

Messrs. Lindhorst & Dreidame, James L. O'Connell of counsel, 1200 American Building, Cincinnati, Ohio 45202, for United States Fire Insurance Company, Defendant and Third-Party Plaintiff, Appellant and Appellee,

Messrs. Bloom & Greene, Gordon C. Greene of counsel, 910 Atlas Bank Building, Cincinnati, Ohio 45202, for Defendant-Appellee, Selective Insurance Company.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, a narrative transcript of the proceedings, specifically designated "Narrative Statement of the Proceedings," the assignments of error, briefs and oral arguments of counsel.[1]

Originally, four actions were filed in the Hamilton County Court of Common Pleas as the outgrowth of an automobile accident which occurred on January 26, 1967, at or near Aiken High School on Belmont Avenue in Cincinnati, Hamilton County, Ohio. The accident resulted in the deaths of Stephen Neuhausser and Carol Koehl and serious personal injuries to Ronald Ison, all of whom were occupants of a motor vehicle operated on the above date by Jon Allan Muskovin, sometimes known as John Allan Muskovin. The captions above clearly indicate the parties to the original actions. Amelia C. Muskovin was included as a defendant in each of the cases since she was the mother of Jon Allan Muskovin and signed his application for a driver's license since at the time he was younger than eighteen years of age. Demands to defend said cases were thereafter made by or on behalf of Jon Allan Muskovin and Amelia C. Muskovin upon the United States Fire Insurance Company. All of said demands were rejected by said insuror. Thereafter, judgments were rendered in all four cases and when the same remained unsatisfied, the original plaintiffs proceeded against the United States Fire Insurance Company, insuror of Jon Allan Muskovin and his mother, Amelia, and at a still later date, the United States Fire Insurance Company initiated third-party actions against Selective Insurance Company whose insured was Edward E. Koehl, owner of the automobile driven by John Allan Muskovin and involved in the accident of January 26, 1967.

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[1] In the mass of papers present in these appeals, there exist numerous discrepancies in the spelling of the Muskovin name. Our conception of the correct names of the Muskovin defendants are AMELIA C. MUSKOVIN, mother, and JON ALLAN MUSKOVIN, a.k.a. JOHN ALLAN MUSKOVIN, son.

The trial court ultimately awarded judgment in favor of United States Fire Insurance Company, hereinafter, U. S. Fire, on the four supplemental complaints, and in favor of Selective Fire Insurance Company, hereinafter, Selective, on the third-party complaints initiated by U. S. Fire. Twelve appeals resulted, numbers of which appear in the caption. It appearing to our Court that the twelve numbered cases involve many of the same issues, it was ordered that all said appeals be consolidated under number C-73253.[2] The assignments of error herein not only are multitudinous and repetitious, but the procedure is also followed by the parties to attempt to cross certify assignments of error, that is, adopt assignments of error postulated by another or other parties. Furthermore, one of the contentions of error below, although not specifically spelled out as an assignment of error, is contained in an argument in the brief. Careful and thorough examination of the postulated assignments, buttressed by the clear direction taken by the briefs and after all oral arguments, compel the inescapable conclusion that these appeals raise only two issues. The first is whether the plaintiffs, with respect to the issues raised in their supplemental complaints, were denied due process in the procedure adopted by the trial court in its disposition thereof. The second issue concerns the trial court's interpretation of the language of certain portions of the insurance policies before the trial court.

It is uncontroverted that the original plaintiffs (Neuhaussers, Koehls, young Ison and his mother) had no trial on their supplemental complaints against U. S. Fire. U. S. Fire maintains that plaintiffs' agreement to a lengthy stipulation and participation in its submission to the trial court and the presentation of briefs, constituted a foreclosure of all relevant factual issues and a knowledgeable waiver of their right to a full-scale trial. The plaintiffs-appellants vigorously disagree with this view and insist that they never intended to waive their right to a trial and, moreover, contend they were responsible for no statements or actions which reasonably could have been construed by the trial court as a waiver. Immediately following the dissemination of the trial court's opinion to the plaintiffs-appellants they importuned the court below, by motion, to schedule a trial date which was denied. Counsel for plaintiffs-appellants called to the attention of the court that their pleadings had requested a jury trial and, moreover, directed the court's attention to the fact that the stipulation did not state that it contained all the evidence in the cases. Counsel further explained to the trial court that they had additional evidence to present in a trial environment. Plaintiffs-appellants brought all these matters to the trial court's attention following issuance of its opinion on July 10, 1972, and months before the court signed judgment entries on May 29, 1973, effectuating the orders contained in the court's opinion.

One of the papers before us in the record, to-wit "Narrative Statement of the Proceedings," endorsed by the trial judge, graphically reflects the position of the trial court with reference to plaintiffs-appellants request for a trial. The following is from the "Narrative Statement of the Proceedings":

> Whereupon, the Court stated that it was true that he had not permitted any oral argument, that he was not allowing oral argument now, that he would not allow any further trial, that he would not allow any party to present evidence, that he was denying the motions to disqualify himself and permit cases to be heard in their entirety ab initio by another judge, that he had decided the cases on the merits, and he was denying the motion to set the cases for trial, that he felt that he had done his work, had studied the Memoranda, read the law and made a decision and written an opinion to which he was holding, *even though mistakenly premature,* which he

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[2] The caption includes all twelve numbers in order to avoid any ambiguity about which cases are disposed of by this decision.

was reaffirming, and he directed that any entry should be presented to him in accordance with his decision and his opinion and he accordingly set the cases for judgment entry. . . . (Emphasis added.)

We believe the plaintiffs-appellants were unjustifiably denied the right to have the issues raised in their supplemental complaints tried to a jury. Although during oral arguments plaintiffs-appellants categorized the action of the trial court by refusing to schedule the subject matters for trial as procedural errors, we conclude that the judgments awarded below, without a trial, denied to plaintiffs-appellants, more than their *procedural* rights; the foreclosure of a jury trial amounted to a deprivation of *substantial* rights. Those assignments of error which challenge the trial court's judgments entered without trial have merit and are sustained. The four cases are remanded to the Hamilton County Court of Common Pleas for further proceedings according to law which include trial settings upon the pending supplemental complaints filed by the plaintiffs-appellants. We purposefully refrain from referring to the remand as one for a new trial in view of our belief that the plaintiffs-appellants received *no* trial below and did not waive same.

Even though we are ordering a remand for further proceedings according to law, which presumably will be in the nature of a trial on the merits pursuant to the supplemental complaints, nevertheless, we consider that there is an obligation to respond to those assignments of error which challenge the trial court's interpretation of the following language of the insurance policy of U. S. Fire:

> "Persons Insured. The following are insureds under Part 1:
> (a) with respect to the owned automobile.
>   (1) the named insured and any resident of the same household.
>   (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
>   (3) any other person or organization [illegible] only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;
> (b) with respect to a non-owned automobile,
>   (1) the named insured,
>   (2) any relative, but only with respect to a private passenger automobile or trailer,
>
> provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and
>   (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above.

The point of disagreement between plaintiffs-appellants and U. S. Fire is whether the proviso clause with respect to permission contained in (b) qualifies "the named insured" and "any relative" or only "any relative." The plaintiffs-appellants position is the permission proviso does not qualify "the named insured." U. S. Fire, on the other hand, of course, contends that the proviso pertains to both (1) and (2) of (b).

The trial court concluded the following in its opinion:

> The determining question in this matter boils down to whether or not the language regarding 'permission' modifies both the named insured and any relative or just any relative. This Court is of the opinion that the question involved is answered in a very properly reasoned opinion in the case of *Bright* v. *Ohio Casualty Insurance Company* found in 444 Federal 2d at p. 1341.

> This Court is of the opinion that the language regarding 'permission' is a limitation on both the named insured and the relative.

Our attention also has been directed to *Bright,* a United States Court of Appeals, Sixth Circuit, decision of June 15, 1971. In *Bright* the court was confronted with construction of a family automobile policy, the language and printed configuration thereof closely resembling the pertinent portions of the policy before us.[3] Because of the great factual similarity, the rationale and decision of *Bright* impress us as compellingly apropros here. In *Bright,* the Sixth Circuit stated, in language in which we concur:

> As we read the relevant portion of the policy before us paragraph (b) is not ambiguous in defining the term 'insureds' for purposes of coverage. The configuration of this paragraph clearly indicates that the provision beginning with 'provided' applies to both (b)(1) and (b)(2). Consequently, under paragraph (b) both the 'named insured' . . . and 'any relative' are 'insureds' only while using a vehicle with the owner's permission. (*Bright,* p. 1343.)

* * *

---

[3] The insurance policy in *Bright* reads in pertinent part:

Persons Insured. The following are insureds under Part 1;
(a) With respect to the owned automobile,
    (1) the named insured and any resident of the same household,
    (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;
(b) With respect to a non-owned automobile,
    (1) the named insured,
    (2) any relative, but only with respect to a private passenger automobile or trailer
provided the actual use thereof is with the permission of the owner;

> Since [the] policy, in our view, denies coverage while the named insured is using a non-owned vehicle without the owner's permission, we must affirm the decision of the court below. Our duty is to read contracts as they are written. We may not extend the terms of an insurance policy beyond the reasonable expectations of the parties and the plain words of the policy. (*Bright,* p. 1344.)

While our conclusion with respect to the legal effect of this policy language might seem to preclude all avenues of recovery by appellants against U. S. Fire (a conclusion obviously drawn by the trial court), it must be noted that appellants contend here, as they contended in the trial court, that they have additional evidence beyond that stipulated, regarding negotiations surrounding the issuance of the insurance policy by U. S. Fire to the Muskovins. Plaintiffs-appellants argue, for instance, their convictions that the testimony of Mrs. Muskovin and that of one Robert W. Vogt, the agent of U. S. Fire, will be a significant part of the evidence which they expect to offer at trial, and may well be held to vary or modify the thrust and effect of the foregoing language of exclusion of coverage. This Court has, of course, no way of knowing what evidence would be offered and received, or the ultimate significance of such evidence, but clearly neither the trial court nor this Court can discount the possibility that such evidence may, indeed, effectively modify the otherwise unambiguous language of the policy. *Craver* v. *Union Fidelity,* 37 Ohio App. 2d 100 (1973). Thus, while we conclude that the trial court's interpretation of the meaning of the disputed language was correct, predicated upon the bare record before it, due process requires that the plaintiffs-appellants be accorded their day in court to determine whether evidence exists to vary the result.

U. S. Fire brought third-party plaintiff actions against Selective Insurance Company. The trial court decided in favor of Selective. Neither U. S. Fire nor Selective offered oral arguments but submitted their respective positions on their briefs. It seems to us that U. S. Fire's appeal from the trial court's decision in favor of Selective is ripe only if ultimately judgment or judgments are granted against U. S. Fire. In view of our remand and the impossibility of determining at this time what judgments will result when these matters again are considered and decided at the trial level, we feel compelled to conclude that U. S. Fire's appeal vis-a-vis Selective simply is premature. What U. S. Fire seems to be endeavoring to secure with respect to Selective could only be an advisory opinion at this time. U. S. Fire's liability may never eventuate. Consequently, we resist deciding only a potential liability.

In oral argument counsel for appellants referred to certain relevant motions having been assigned to a different judge of the Hamilton County Court of Common Pleas and claimed to be presently pending. Whatever the motions may be and whatever status they may enjoy, we consider that the record does not bring them before us at this time.

Therefore, we remand the cases here on appeal to the Court of Common Pleas of Hamilton County for further proceedings according to law, including trial on the merits. Furthermore, we find no error in the trial court's construction of the disputed portions of the insurance policy issued by U. S. Fire to Amelia C. Muskovin and Jon Allan Muskovin absent any subsequently developed proof varying the policy language. We dismiss U. S. Fire's appeals of the trial court's judgment in favor of Selective Insurance Company.

SHANNON, P. J., PALMER and KEEFE, J.J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Nos. C73253, C73271, C73279
A232481, 235384, 235385, 236200

HENRY NEUHAUSSER, ADMINISTRATOR OF THE ESTATE OF STEPHEN NEUHAUSSER, DECEASED

and

HENRY NEUHAUSSER
Plaintiffs,

v.

JON ALLAN MUSCOVIN and AMELIA MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Third Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C73273, C73276, C73288

RONALD ISON, a minor, by and through his mother, natural guardian and next friend, EDNA ISON SCOTT
Plaintiff,

v.

JON ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C73274, C73284, C73289

EDNA ISON SCOTT,
Plaintiff,
v.
JON ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C73272, C73277, C73285

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, Deceased,
Plaintiff,
v.
JOHN A. MUSKOVIN, Also known as
JOHN A. MUSKOVIN and AMELIA C. MUSKOVIN,
Defendants,

and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered October 14, 1975)

These cause came on to be heard upon the appeal on questions of law, assignments of error, the narrative statement of proceedings from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that those assignments of error which challenge the trial court's judgments entered without trial have merit and are sustained, for the reasons set forth in the Decision filed herein and Made a part hereof; further, we find the assignments of error relative to the trial court's construction of the disputed portions of the insurance policy issued by U.S. Fire to Amelia C. Muskovin and Jon Allan Muskovin have no merit and are overruled.

It is, therefore, Ordered by the Court that the four cases are remanded to the Hamilton County Court of Common Pleas for further proceedings according to law which may include trial settings upon the pending supplemental complaints filed by the plaintiffs-appellants and the appeals of U.S. Fire, appellate numbers C73285 C73279 C73289 and C73288, ought to be hereby are dismissed as being premature.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxes in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

Exceptions noted.

APPENDIX F

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-73253

HENRY NEUHAUSSER, Administrator of the Estate of
SEPHEN NEUHAUSSER, Deceased, et al.,
Plaintiffs-Appellants,

v.

JON ALLEN MUSCOVIN, ET AL.,
Defendants-Appellees.

ENTRY OF OHIO COURT OF APPEALS OVERRULING APPLICATIONS FOR RECONSIDERATION AND MODIFICATION ENTERED NOVEMBER 7, 1975

(Entered November 7, 1975)

This cause came on to be heard by the Court upon the applications of the appellants for reconsideration of the decision and judgment entered herein and upon the memorandum of United States Fire Insurance Company, appellee, in opposition to said applications, and

The Court, being fully advised in the premises, finds that said motion is not well taken and that the same ought to be, and hereby is, overruled.

ENTRY OVERRULING APPLICATIONS FOR RECONSIDERATION AND MODIFICATION. Shannon, P.J.

APPENDIX G

Nos. C-77839 (Consolidated No.) C-77845

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, Deceased,
Plaintiff-Appellant,
v.
JOHN A. MUSCOVIN a/k/a JON A. MUSCOVIN
AMELIA C. MUSCOVIN,
Defendants-Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee and Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-77846, C-780007

RONALD ISON, a Minor, by and through his Mother,
Natural Guardian and Next Friend, EDNA ISON SCOTT,
Plaintiff-Appellant,
v.
JON ALLEN MUSCOVIN, AMELIA C. MUSCOVIN
and ROBERT W. VOGHT,
Defendants-Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee and Third-Party Plaintiff,
v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-77844, C-77854, C-780008

EDNA ISON SCOTT,
Plaintiff-Appellant,
v.
JON ALLEN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants-Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee and Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-77841, C-77847

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased,
and HENRY NEUHAUSSER,
Plaintiffs-Appellants,
v.
JON ALLAN MUSCOVIN and AMELIA MUSCOVIN,
Defendants-Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee and Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

DECISION

(Filed March 21, 1979)

Messrs. Rosen & Rosen, Hyman B. Rosen of counsel, 1005 First National Bank Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant, Edward E. Koehl, Administrator,

Messrs. Waite, Schindel, Bayless & Schneider, Stanley M. Chesley of counsel, 1318 Central Trust Tower, Cincinnati, Ohio 45202, for Plaintiffs-Appellants, Ronald Ison and Edna Ison Scott,

Messrs. Beall, Hermanies & Bortz, Walter C. Beall of counsel, 200 Dixie Terminal Building, Cincinnati, Ohio 45202, for Plaintiffs-Appellants, Henry Neuhausser, Administrator, and Henry Neuhausser,

Messrs. Wesselmann & Renner, Russell W. Renner of counsel, 3526 Glenmore Avenue, Cincinnati, Ohio 45202, for Defendants-Appellants, Jon Allen Muscovin and Amelia C. Muscovin,

Messrs. Lindhorst & Dreidame, James L. O'Connell of counsel, 1200 American Building, Cincinnati, Ohio 45202, for Defendant and Third-Party Plaintiff and Appellee, United States Fire Insurance Company.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the briefs and oral arguments of counsel.

The caption of this decision includes all nine appellate case numbers in order to obviate any uncertainty about which cases are disposed of on this appeal. However, all said appeals have been consolidated under number C-77839. Selective Insurance Company is named in the caption, but is not involved in this appeal.

I.

All matters now before us are the direct outgrowth of an automobile accident which occurred in Cincinnati, Ohio, on January 26, 1967, and the course of these cases has indeed been regrettably protracted.

The accident twelve years ago resulted in:

(1) the death of Stephen Neuhausser and Carol Koehl, and

(2) serious personal injuries to Ronald Ison.

These three were occupants of a motor vehicle operated on the accident date by John Allen Muscovin, but owned by Edward E. Koehl, father of Carol Koehl, one of the victims. The instant parties were in the Court of Appeals in the fall of 1975, all as appellants except United States Fire Insurance Company, hereinafter U. S. Fire. They have returned now in appellate roles similar to those enjoyed three and a half years ago. We decided those earlier appeals -- twelve of them – on October 14, 1975, under the consolidated case number C-73253 (unreported). We explained in explicit language in the decision that the twelve appeals raised only two issues, as follows:

> The first is whether the plaintiffs [appellants then and now], with respect to the issues raised in their supplemental complaints, were denied due process in the procedure adopted by the trial court in its disposition thereof. The second issue concerns the trial court's interpretation of the language of certain portions of the insurance policies before the trial court.

Simply stated, we agreed with appellants *vis-a-vis* the first issue, we sustained those assignments of error which raised it, and remanded for further proceedings according to law which, we believed and decided, meant proceeding anew, except as qualified by our decision on the second issue.

The second issue concerned the trial court's interpretation of certain insurance policy language. This issue was formulated for us by appellants' assignments in C-73253, plus substantial portions of their briefs and extensive oral argument in the Court of Appeals. We were compelled to consider and decide issue number two.[1] (It is noted parenthetically that the form of appellants' assignments of error in C-73253 was by no means ideal. The assignments were elliptical and often vague. We interpreted them by a liberal resort to the text of the briefs thereby constituting them manageable assignments.)

The disputed language of the insurance policy of U. S. Fire follows:

> "Persons Insured. The following are insureds under Part 1:
> (a) with respect to the owned automobile.
>   (1) the named insured and any resident of the same household.
>   (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and
>   (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;
> (b) with respect to a non-owned automobile,
>   (1) the named insured,
>   (2) any relative, but only with respect to a private passenger automobile or trailer,
> provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

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[1] "All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." App. R. 12(A).

> (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above.

As we wrote in C-73253 (Oct. 14, 1975), the point of disagreement between the appellants and U. S. Fire was whether the previso clause with respect to permission contained in (b) qualifies "the named insured" and "any relative" – or only "any relative." The plaintiffs-appellants' position was, and is, that the permission proviso does not qualify "the named insured." U. S. Fire, on the other hand, contends that the proviso pertains to both (1) and (2) of (b). If the permission proviso applies only to a relative, then the Muscovins – mother and son – would be covered by the insurance policy. However, if the permission exception applies both to "any relative" *and* to "the named insured," then the Muscovins are not covered because both mother and son were named insured and the son who was driving at the time of the accident indisputably had no permission from the owner of the automobile. The trial court held that the policy language regarding permission "is a limitation on both the named insured and the relative." Thus, the Muscovins were not covered. We agreed with the trial court in our decision of October 14, 1975, and our judgment entry of even date.[2]

On October 21, 1975, plaintiffs-appellants filed in the Court of Appeals applications for reconsideration and for modification of the judgment, with accompanying written argument. The manifest thrust of those applications was appellants' challenge to our interpreting the insurance policy language at all – and additionally to our particular interpretation thereof.

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[2] The following appears in the judgment entry of October 14, 1975:

> Upon consideration thereof, the Court finds that those assignments of error which challenge the trial court's judgments entered without trial have merit and are sustained, for the reasons set forth in the Decision filed herein and made a part hereof; further, *we find the assignments of error relative to the trial court's construction of the disputed portions of the insurance policy issued by U. S. Fire to Amelia C. Muskovin [sic] and Jon Allan Muskovin [sic] have no merit and are overruled.* (Emphasis supplied.)

We overruled the applications for reconsideration and modification of entry. No appeal of our judgment of October 14, 1975, was ever accomplished, but rather the parties returned to the trial court below for trial pursuant to our mandate and our affirmance of the trial court's earlier interpretation of the policy language – which, it is emphasized, was not appealed although disapproved by the appellants in their 1975 briefs, and especially pointedly in their application for reconsideration of our October 14, 1975, judgment.

II.

Thereafter, activity resumed in the court of common pleas. The plaintiffs (appellants here) filed their motion for summary judgment against U. S. Fire which countered for summary judgment in its favor. Memoranda and affidavits were filed by all the parties, and upon hearing, the court of common pleas granted the motion for summary judgment of U. S. Fire. The court also overruled plaintiffs' motion for summary judgment and their motion for leave to file amended supplemental complaints against U. S. Fire. Plaintiffs also desired to make Robert W. Vogt a new party defendant. The appeals now before us ensued with the appellants presenting five assignments of error. We consider the first two together since they raise the single issue of the correctness of the order granting the motion of U. S. Fire for summary judgment and overruling the plaintiffs' motions for summary judgment.

The trial court complied with Civ. R. 56 in granting the motion for summary judgment of U. S. Fire. We find no error in the ruling. Most of appellant's briefs with respect to these initial assignments is devoted to challenging the trial

court in refusing to admit that reasonable minds could come to more than one conclusion concerning the meaning of the disputed insurance policy language. The trial judge (Judge Gusweiler) was not at that juncture free to entertain such a possibility. He had no choice but to accept as the controlling law of the case that the only interpretation that could be placed on the subject language was that which the Court of Appeals had decided in affirming the interpretation given by the judge before whom the matter originally had come. For Judge Gusweiler to have held that the interpretation of the policy language was undecided would have been untenable. By that time, the appellants had received an unfavorable ruling on construction of the policy by the first trial judge, had appealed the ruling, had ascribed error in said ruling in its appellate assignments and briefs, had lost in the Court of Appeals, had moved for reconsideration of the unfavorable appellate judgment, were unsuccessful in that endeavor, failed to seek a review by the Supreme Court, and were back in the court of common pleas attempting to start all over again oblivious to the meaningful developments which already had transpired, and especially the adjudication by the Court of Appeals. Moreover, arguments in appellants' briefs notwithstanding, we find nothing in the policy which provides any justification for differentiating between Mrs. Muscovin and her son with respect to coverage. Assignments one and two lack merit. We overrule them. To decide otherwise would be to conclude that the earlier appeal – with its issues – and the judgment in connection therewith, were for all intents and purposes, meaningless.[3]

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[3] The fact bears emphasis that when the appellants came to the Court of Appeals in C-73253, with respect to interpretation of the policy language, the thrust of their position was not that the trial court should not have construed the disputed language, but that the court interpreted it wrong. That was the issue presented to us. Horeover, much authority exists jurstifying the original trial court's construction of the policy. The respective provinces and functions of the court and jury in reference to the construction of contracts, including insurance policies, depend on

The verbatim third assignment asserts:

> The trial court erred in overruling plaintiffs' motion for leave to file amended and supplemental complaints against the United States Fire Insurance Co., defendant and to make Robert W. Vogt a party defendant.

Whether to grant leave to file further supplemental complaints against U. S. Fire and to make Vogt a party defendant were discretionary with Judge Gusweiler. We discern no abuse of the court's discretion. Being devoid of merit, the assignment is overruled.

The penultimate challenge claims that the court below erred in failing to submit the cases of the plaintiffs-appellants to trial by a jury. If the requirements of Civ. R. 56 are satisfied, as we have herein decided they were, and the court grants a motion for summary judgment (as here), then trial to court or jury is not indicated. The fourth assignment fails.

That "the judgments are contrary to law" is the contention of the last assignment. In the one sentence accompanying this assignment we are invited to consider the arguments urged in support of the previous assignments of error. We have studied all the arguments offered in the briefs and find nothing which would validate this assignment. It is overruled.

Thus, we affirm the judgments below.

KEEFE, P. J., SHANNON and CASTLE, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

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many considerations, but the interpretation of a printed instrument often is exclusively for the court. 88 C. J. S. Trial § 217; 52 O. Jur. 2d Trial § 97. *Cf. Olmstead* v. *Lumbermens Mutl. Ins. Co.* (1970), 22 Ohio St. 2d 212, 259 N.E.2d 123.

APPENDIX H

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Nos. C-77839 (Consolidated No.) C-77845

EDWARD E. KOEHL, Administrator of the Estate of CAROL E. KOEHL, Deceased,
Appellant,

v.

JOHN A. MUSCOVIN a/k/a JON A. MUSCOVIN and AMELIA C. MUSCOVIN,
Appellants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Appellee and Third-Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-77846, C-780007

RONALD ISON, a Minor, by and through his Mother, Natural Guardian and Next Friend, EDNA ISON SCOTT,
Appellant,

v.

JON ALLEN MUSCOVIN, AMELIA C MUSCOVIN
and ROBERT W. VOGT,
Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Appellee and Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-77844, C-77854, C-780008

EDNA ISON SCOTT,
Appellant,
v.
JON ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Appellee and Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

Nos. C-77841, C-77847

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased,
and HENRY NEUHAUSSER,
Appellants,
v.

JON ALLAN MUSCOVIN and AMELIA MUSCOVIN,
Appellants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Appellee and Third-Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered March 21, 1979)

These causes came on to be heard upon the appeals on questions of law, assignments of error, the records from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgments of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby are, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which counsel except.

APPENDIX I

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-232481

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased

and

HENRY NEUHAUSSER,
Plaintiffs,

v.

JON ALLAN MOSCOVIN,
Defendant,

and

AMELIA MUSCOVIN,
Defendant,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third-Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

No. A-235384

RONALD ISON, a minor, by and through his mother,
Natural guardian, and next friend, EDNA ISON SCOTT,
Plaintiff,

v.

JOHN ALLEN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

No. A-235385

EDNA ISON SCOTT,
Plaintiff,

v.

JOHN ALLEN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

No. A-236200

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, Deceased,
Plaintiff,

v.

JOHN A. MUSKOVIN, also known as JON A. MOSKOVIN
and AMELIA C. MUSKOVIN,
Defendants,
and

UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,

v.

SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

OPINION

(Dated July 10, 1972)

MATTHEWS, J.:

By agreement of counsel these four cases were consolidated for submission to this branch of this court on supplemental petitions of plaintiffs and defendants' answer and third-party complaints and joint stipulation. The third-party defendant did not file an answer but agreed through counsel to submit the matter as a question of law to this court.

Facts as needed for a determination of the issues are generally that on January 26, 1967, one John (or Jon) Muscovin, a minor less than eighteen (18) years old, without permission, entered and operated a 1962 Ford automobile owned by one Edward Koehl. Johnson was the son of Alfred J. and Amelia C. Muscovin and Amelia had signed her son's application for driver's license pursuant to Revised Code Section 4507.07, making her jointly and severally liable for any negligence or willful or wanton misconduct of John in the operation of a motor vehicle.

At that time there was in full force and effect automobile liability policy #646827 issued by the third-party defendant Selective Insurance Company, covering the Koehl automobile.

On that date there was in full force and effect an automobile liability insurance policy issued by the defendant, third-party plaintiff, United States Fire Insurance Co., No. FAC 51 59 74. That policy had as named insured, Alfred J. Muskovin and Amelia C. Muskovin. It also had an endorsement for which an additional premium was paid naming an "added operator – Jon Allen Muskovin 12/20/49 D.T."

While John was operating the Koehl automobile he was involved in an accident which resulted in the deaths of Stephen Neuhausser and Carol Koehl and in serious personal injury to Ronald Ison, all of whom were occupants of the Koehl motor vehicle at that time. These four actions for wrongful death or personal injuries were filed against John Muscovin and Amelia Muscovin with all plaintiffs claiming Amelia liable under Revised Code Section 4507.07. The Insurance Companies were tendered the defense of all four actions and both declined. Defendants John and Amelia Muscovin employed private counsel who filed answers but waived trial by jury and actually offered no defense and judgments were obtained in all four actions against those two defendants. These judgments are all unsatisfied, unreversed and unmodified. Thereafter, supplemental complaints were filed in each action and thereafter third-party complaints were filed in each action by the United States Fire Insurance Company against the third-party defendant Selective Insurance Company.

Thereafter, the cases were consolidated for trial on the supplemental complaints and third-party complaints with counsel agreeing the matter would be submitted on the agreed stipulation. United States Fire Insurance Company policy named in Item 1, Alfred J. Muskovin and Amelia C. Muskovin, and in the endorsement named as "Added Operator -- Jon Muskovin." The insuring agreement of the policy provides:

> "Coverage A – Bodily Injury Liability; Coverage B – Property Damage Liability. To pay on behalf of the Insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

Selective Insurance Company policy had as the named insured "Edward E. Koehl" and under "Persons Insured" provides:

"(a) with respect to the owned automobile.

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;"

The question to be determined is whether either or both policies insure the defendants Muscovin. If both insure them, the defendant third-party plaintiff offers only excess coverage.

We examine first the provisions of the Selective Insurance Company coverage because normally insurance coverage follows the car, not the insured.

The defendants Muscovin were not (1) the named insured or a resident of the named insured's household (2) using such automobile with the permission of the named insured and (3) they neither one are "an insured under (a), (1) or (2)."

Therefore, this Court concludes that neither of the defendants Muscovin can qualify as an insured under the Selective policy.

In looking at the insurance coverage offered under the provisions with respect to a non-owned automobile under the United States Fire Insurance Company policy, Amelia Muscovin is named in Item 1 of the policy as the named insured and this policy provides that with respect to a non-owned automobile persons insured are (1) the named insured, (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation is with the permission or reasonably believed to be with the permission of the owner.

Counsel for plaintiff by their memoranda argued that the permission portion of the non-owned automobile pertains only to (2) "any relative" and not to (1) the named insured.

To remove the figures and indentations from the language, omitting some clauses and leave the sentence as it is written, we find that it says:

> "The following are insureds with respect to a non-owned automobile, the named insured, any realtive, provided his actual operation is with the permission of the owner."

The determining question in this matter boils down to whether or not the language regarding "permission" modifies both the named insured and any relative or just any relative. This Court is of the opinion that the question involved is answered in a very properly reasoned opinion in the case of *Bright* v. *Ohio Casualty Insurance Company*, found in 444 Federal 2d, at page 1341.

This Court is of the opinion that the language regarding "permission" is a limitation on both the named insured and the relative.

The Court finds for the third party defendant on the third party plaintiff's complaint and for the defendant on the supplemental complaint.

APPEARANCES:

WALTER C. BEALL,
Attorney for Plaintiff Henry Neuhausser

STANLEY M. CHESLEY,
Attorney for Plaintiffs Ronald Ison and Edna Ison Scott

ROSEN & ROSEN,

Attorneys for Plaintiff Edward E. Koehl, Administrator
RUSSELL W. RENNER,
Attorney for Defendants Muscovin

JAMES L. O'CONNELL,
Attorney for Defendant United States Fire Insurance Co.

GORDON C. GREENE,
Attorney for Defendant Selective Insurance Co.

July 10, 1972.

APPENDIX J

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-232481

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased

and

HENRY NEUHAUSSER,
Plaintiffs,

v.

JON ALLAN MOSCOVIN,
AMELIA MUSCOVIN,
ROBERT W. VOGT,
UNITED STATES FIRE INSURANCE COMPANY,

and

SELECTIVE INSURANCE COMPANY,
Defendants.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This matter came on to be heard upon the pleadings, the stipulation of the parties and the memoranda of counsel.

The Court finds in favor of the Defendant, United States Fire Insurance Company, on the Plaintiffs' supplemental Petition (Complaint) against the Defendant, United States Fire Insurance Company, and hereby enters final judgment on said supplemental Petition (Complaint) in favor of the Defendant, United States Fire Insurance Company, and against the Plaintiffs, at the costs of the Plaintiffs.

On the third party Complaint of the Defendant-Third Party Plaintiff, United States Fire Insurance Company, against the Third Party Defendant, Selective Insurance Company, the Court finds in favor of the said Third Party Defendant, Selective Insurance Company, and hereby and herewith enters final judgment on said Third Party Complaint in favor of said Third Party Defendant, Selective Insurance Company, and against the Defendant-Third Party Plaintiff, United States Fire Insurance Company.

APPENDIX K

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-232481

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased
and
HENRY NEUHAUSSER,
Plaintiffs,
v.
JON ALLAN MUSCOVIN and AMELIA MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE CO.,
Defendant, Third-Party Plaintiff.
v.
SELECTIVE INSURANCE CO.,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This matter came on to be heard upon the pleadings, the stipulation of the parties and the memoranda of counsel and was, by agreement of the parties, submitted to the Court for a decision upon the merits. There is some controversy among the parties as to whether one or more of the parties anticipated or desired oral argument in connection with the Court's determination of the issues submitted, but no written request for oral argument was made by any party prior to July 10, 1972.

The Court finds that the said pleadings and stipulation contain all of the facts necessary for the Court to make a determination, as a matter of law, of the issues raised by the plaintiffs' supplemental petition (complaint) against the defendant, United States Fire Insurance Company.

On July 10, 1972, without hearing any oral argument from any party but upon consideration of all of the foregoing, the Court filed its opinion in this case which opinion the Court now ratifies and adopts and makes a part of this entry by reference, and the Court now finds in favor of the defendant, United States Fire Insurance Company, on the plaintiffs' supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiffs, at the costs of the plaintiffs.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds in favor of the said third party defendant, Selective Insurance Company, and hereby and herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective Insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

On July 19, 1972, the plaintiffs filed their motion to set this case for trial, and the Court, upon consideration, finds that, under the aforesaid pleadings, stipulation and memoranda, there is no factual determination necessary for a resolution of the issues presented by the plaintiffs' supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and that the said motion to set this case for trial is not well taken and hereby and herewith overrules the same.

On December 21, 1972, at a meeting between the Court and counsel, at which time the Court directed the preparation of this Entry, the position of the plaintiffs and of the defendants, Jon Allan Muscovin and Amelia Muscovin, was that they did not wish to present oral argument subsequent to this Court's opinion rendered on July 10, 1972, because such opinion indicated that this Court had already reached certain conclusions in connection with this case. The Court, in making the foregoing orders, is cognizant of the stated position of such parties.

Appropriate exceptions are reserved to the parties as to all of the foregoing.

On November 8, 1972, the plaintiffs filed their motion for leave to file and serve their further amended and supplemental complaint and for leave to issue summons on Robert W. Vogt as a new party-defendant, and on November 9, 1972, the defendants, Jon Allan Muscovin and Amelia Muscovin, filed their motion for leave to file a cross-claim and for leave to issue summons on Robert W. Vogt as a new party-defendant. Both of said motions remain pending, and the foregoing Entry shall not affect such motions in any way. It is further ordered that the within action be re-assigned to another Judge of this Court for determination of those motions not determined by this Entry and for any and all further proceedings in this case not connected with the matters determined by this Entry.

APPENDIX L

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-236200

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, Deceased,
Plaintiff,
v.
JOHN A. MUSKOVIN, also known as JON A. MOSKOVIN
and
AMELIA C. MUSKOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This cause came on to be heard on the pleadings, stipulation, memoranda, and the motions of the plaintiff herein to set the case for trial and to file and serve plaintiff's Amended Supplemental Complaint, without the presentment of evidence or trial had, on consideration of which the Court overrules said motion to set the case for trial.

Further, pursuant to the oral request of the plaintiff, the Court refers the motion of the plaintiff to file and serve an Amended Supplemental Complaint on behalf of the plaintiff to the Assignment Commissioner of the Court to be assigned for hearing to another Judge of this Court in accordance with the rules of this Court, so that said motion remains pending and unaffected by the Court's ruling on the merits, as hereafter set forth herein.

The Court finds on the merits without trial had in favor of the defendant, United States Fire Insurance Company, on the plaintiff's Supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiff, at the costs of the plaintiff.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds without trial had in favor of the said third party defendant, Selective Insurance Company, and hereby herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective Insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

Appropriate exceptions are reserved to the respective parties as to all of the foregoing.

APPENDIX M

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-236200

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, Deceased,
Plaintiff,
v.
JOHN A. MUSKOVIN, also known as JON A. MOSKOVIN
and
AMELIA C. MUSKOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This matter came on to be heard upon the pleadings, the stipulation of the parties and the memoranda of counsel and was, by agreement of the parties, submitted to the Court for a decision upon the merits. There is some controversy among the parties as to whether one or more of the parties anticipated or desired oral argument in connection with the Court's determination of the issues submitted, but no written request for oral argument was made by any party prior to July 10, 1972.

The Court finds that the said pleadings and stipulation contain all of the facts necessary for the Court to make a determination, as a matter of law, of the issues raised by the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company.

On July 10, 1972, without hearing any oral argument from any party but upon consideration of all of the foregoing, the Court filed its opinion in this case which opinion the Court now ratifies and adopts and makes a part of the Entry by reference, and the Court now finds in favor of the defendant, United States Fire Insurance Company, on the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiff, at the costs of the plaintiff.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds in favor of the said third party defendant, Selective Insurance Company, and hereby and herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective Insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

On July 19, 1972, the plaintiff filed his motion to set this case for trial, and the Court, upon consideration, finds that, under the aforesaid pleadings, stipulation and memoranda, there is no factual determination necessary for a resolution of the issues presented by the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and that the said motion to set this case for trial is not well taken and hereby and herewith overrules the same.

On December 21, 1972, at a meeting between the Court and counsel, at which time the Court directed the preparation of this Entry, the position of the plaintiff and of the defendants, John A. Muskovin, also known as Jon A. Muscovin, and Amelia C. Muskovin, was that they did not wish to present oral argument subsequent to this Court's opinion rendered on July 10, 1972, because such opinion indicated that this Court had already reached certain conclusions in connection with this case. The Court, in making the foregoing orders, is cognizant of the stated position of such parties.

Appropriate exceptions are reserved to the parties as to all of the foregoing.

On November 1, 1972, the plaintiff filed his motion for leave to file and serve his further amended and supplemental complaint and for leave to issue summons on Robert W. Vogt as a new party-defendant, and on November 9, 1972, the defendants, John A. Muskovin, also known as Jon A. Muscovin, and Amelia C. Muskovin, filed their motion for leave to file a cross-claim and for leave to issue summons on Robert W. Vogt as a new party-defendant. Both of said motions remain pending, and the foregoing Entry shall not affect such motions in any way. It is further ordered that the within action be re-assigned to another Judge of this Court for determination of those motions not determined by this Entry and for any and all further proceedings in this case not connected with the matters determined by this Entry.

APPENDIX N

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-235384

RONALD ISON, a minor, by and through his mother, natural guardian and next friend, EDNA ISON SCOTT,
Plaintiff,
v.
JOHN ALLEN MUSCOVIN and AMELIA C. MUSCOVIN and ROBERT W. VOGT,
Defendants,
and
UNITED STATE FIRE INSURANCE CO.,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE CO.,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This cause came on to be heard on the pleadings, stipulation, memoranda, and the motions of the plaintiff herein to set the case for trial and to file and serve plaintiff's Amended Supplemental Complaint, without presentment of evidence or trial had, on consideration of which the Court overrules said motion to set the case for trial.

Further, pursuant to the oral request of the plaintiff, the Court refers the motion of the plaintiff to file and serve an amended supplemental complaint on behalf of the plaintiff to the Assignment Commissioner of the Court to be assigned for hearing to another Judge of this Court in accordance with the rules of this Court, so that said Motion remains pending and unaffected by the Court's ruling on the merits, as hereafter set forth herein.

The Court finds on the merits, without trial, in favor of the defendant, United States Fire Insurance Company, on the plaintiff's Supplemental petition (Complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiff, at the costs of the plaintiff.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds in favor of the said third party defendant, Selective Insurance Company, without trial, and hereby herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective Insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

Appropriate exceptions are reserved to the respective parties as to all of the foregoing.

APPENDIX O

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-235334

RONALD ISON, a minor, by and through his mother, natural guardian and next friend, EDNA ISON SCOTT,
Plaintiff,
v.
JOHN ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This matter came on to be heard upon the pleadings, the stipulation of the parties and the memoranda of counsel and was, by agreement of the parties, submitted to the Court for a decision upon the merits. There is some controversy among the parties as to whether one or more of the parties anticipated or desired oral argument in connection with the Court's determination of the issues submitted, but no written request for oral argument was made by any party prior to July 10, 1972.

The Court finds that the said pleadings and stipulation contain all of the facts necessary for the Court to make a determination, as a matter of law, of the issues raised by the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company.

On July 10, 1972, without hearing any oral argument from any party but upon consideration of all of the foregoing, the Court filed its opinion in this case which opinion the Court now ratifies and adopts and makes a part of the Entry by reference, and the Court now finds in favor of the defendant, United States Fire Insurance Company, on the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiff, at the costs of the plaintiff.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds in favor of the said third party defendant, Selective Insurance Company, and hereby and herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective Insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

On July 19, 1972, the plaintiff filed his motion to set this case for trial, and the Court, upon consideration, finds that, under the aforesaid pleadings, stipulation and memoranda, there is no factual determination necessary for a resolution of the issues presented by the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and that the said motion to set this case for trial is not well taken and hereby and herewith overrules the same.

On December 21, 1972, at a meeting between the Court and counsel, at which time the Court directed the preparation of this Entry, the position of the plaintiff and of the defendants, John Allan Muscovin and Amelia C. Muscovin, was that they did not wish to present oral argument subsequent to this Court's opinion rendered on July 10, 1972, because such opinion indicated that this Court had already reached certain conclusions in connection with this case. The Court, in making the foregoing orders, is cognizant of the stated position of such parties.

Appropriate exceptions are reserved to the parties as to all of the foregoing.

On November 1, 1972, the plaintiff filed his motion for leave to file and serve his further amended and supplemental complaint and for leave to issue summons on Robert W. Vogt as a new party-defendant, and on November 9, 1972, the defendants, John Allan Muscovin and Amelia C. Muscovin, filed their motion for leave to file a cross-claim and for leave to issue summons on Robert W. Vogt as a new party-defendant. Both of said motions remain pending, and the foregoing Entry shall not affect such motions in any way. It is further ordered that the within action be re-assigned to another Judge of this Court for determination of those motions not determined by this Entry and for any and all further proceedings in this case not connected with the matters determined by this Entry.

APPENDIX P

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-235385

EDNA ISON SCOTT,
Plaintiff,
v.
JOHN ALLEN MUSCOVIN and AMELIA C. MUSCOVIN
and ROBERT W. VOGT,
Defendants,
and
UNITED STATES FIRE INSURANCE CO.,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This cause came on to be heard on the pleadings, stipulation, memoranda, and the motions of the plaintiff herein to set the case for trial and to file and serve plaintiff's Amended Supplemental Complaint, without presentment of evidence or trial had, on consideration of which the Court overrules said motion to set the case for trial.

Further, pursuant to the oral request of the plaintiff, the Court refers the motion of the plaintiff to file and serve an Amended Supplemental Complaint on behalf of the plaintiff to the Assignment Commissioner of the Court to be assigned for hearing to another Judge of this Court in accordance with the rules of this Court, so that said Motion remains pending and unaffected by the Court's ruling on the merits, as hereafter set forth herein.

The Court finds on the merits, without trial, in favor of the defendant, United States Fire Insurance Company, on the plaintiff's Supplemental Petition (Complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiff, at the costs of the plaintiff.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds in favor of the said third party defendant, Selective Insurance Company, without trial, and hereby herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective Insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

Appropriate exceptions are reserved to the respective parties as to all of the foregoing.

APPENDIX Q

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-235385

EDNA ISON SCOTT,
Plaintiff,
v.
JOHN ALLAN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third-Party Defendant.

JUDGMENT ENTRY

(Entered May 29, 1973)

(/s/ MATTHEWS, J.)

This matter came on to be heard upon the pleadings, the stipulation of the parties and the memoranda of counsel and was, by agreement of the parties submitted to the Court for a decision upon the merits. There is some controversy among the parties as to whether one or more of the parties anticipated or desired oral argument in connection with the Court's determination of the issues submitted, but no written request for oral argument was made by any party prior to July 10, 1972.

The Court finds that the said pleadings and stipulation contain all of the facts necessary for the Court to make a determination, as a matter of law, of the issues raised by the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company.

On July 10, 1972, without hearing any oral argument from any party but upon consideration of all of the foregoing, the Court filed its opinion in this case which opinion the Court now ratifies and adopts and makes a part of this Entry by reference and the Court now finds in favor of the defendant, United States Fire Insurance Company, on the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and hereby and herewith enters final judgment on said supplemental petition (complaint) in favor of the defendant, United States Fire Insurance Company, and against the plaintiff, at the costs of the plaintiff.

On the third party complaint of the defendant-third party plaintiff, United States Fire Insurance Company, against the third party defendant, Selective Insurance Company, the Court finds in favor of the said third party defendant, Selective Insurance Company, and hereby and herewith enters final judgment on said third party complaint in favor of said third party defendant, Selective insurance Company, and against the defendant-third party plaintiff, United States Fire Insurance Company.

On July 19, 1972, the plaintiff filed her motion to set this case for trial, and the Court, upon consideration, finds that, under the aforesaid pleadings, stipulation and memoranda, there is no factual determination necessary for a resolution of the issues presented by the plaintiff's supplemental petition (complaint) against the defendant, United States Fire Insurance Company, and that the said motion to set this case for trial is not well taken and hereby and herewith overrules the same.

On December 21, 1972, at a meeting between the Court and counsel, at which time the Court directed the preparation of this Entry, the position of the plaintiff and of the defendants, John Allan Muscovin and Amelia C. Muscovin, was that they did not wish to present oral argument subsequent to this Court's opinion rendered on July 10, 1972, because such opinion indicated that this Court had already reached certain conclusions in connection with this case. The Court, in making the foregoing orders, is cognizant of the stated position of such parties.

Appropriate exceptions are reserved to the parties as to all of the foregoing.

On November 1, 1972, the plaintiff filed her motion for leave to file and serve her further amended and supplemental complaint and for leave to issue summons on Robert W. Vogt as a new party-defendant, and on November 9, 1972, the defendants, John Allan Muscovin and Amelia C. Muscovin, filed their motion for leave to file a cross-claim and for leave to issue summons on Robert W. Vogt as a new party-defendant. Both of said motions remain pending, and the foregoing Entry shall not affect such motions in any way. It is further ordered that the within action be re-assigned to another Judge of this Court for determination of those motions not determined by this Entry and for any and all further proceedings in this case not connected with the matters determined by this Enty. (sic)

APPENDIX R

ENTRY GRANTING SUMMARY JUDGMENT TO THE UNITED STATES FIRE INSURANCE COMPANY

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-232481

HENRY NEUHAUSSER, Administrator of the Estate of
STEPHEN NEUHAUSSER, Deceased,

and

HENRY NEUHAUSSER,
Plaintiffs,

v.

JON ALLAN MUSCOVIN and AMELIA MUSCOVIN,
Defendants,

and

UNITED STATES FIRE INSURANCE CO.,
Defendant, Third Party Plaintiff,

v.

SELECTIVE INSURANCE CO.,
Third-Party Defendant.

Case No. A-235384

RONALD ISON, a minor by and through his mother,
natural guardian and next friend, EDNA ISON SCOTT,
Plaintiff,

v.

JOHN ALLEN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third Party Defendant.

Case No. A-235385

EDNA ISON SCOTT,
Plaintiff,
v.
JOHN ALLEN MUSCOVIN and AMELIA C. MUSCOVIN,
Defendants,
and
UNITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY,
Third Party Defendant.

Case No. A-236200

EDWARD E. KOEHL, Administrator of the Estate of
CAROL E. KOEHL, deceased
Plaintiff,
v.

JOHN A. MUSCOVIN, also known as JON A. MUSCOVIN
and AMELIIA C. MUSCOVIN,
Defendants,
and
UNIITED STATES FIRE INSURANCE COMPANY,
Defendant, Third Party Plaintiff,
v.
SELECTIVE INSURANCE COMPANY
Third Party Defendant.

ENTRY GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT UNITED STATES FIRE INSURANCE COMPANY, AND OVERRULING MOTIONS OF PLAINTIFFS AND OF DEFENDANTS JON ALLEN MUSCOVIN AND AMELIA MUSCOVIN FOR SUMMARY JUDGMENT, TO STRIKE MOTION FOR SUMMARY JUDGMENT OF UNITED STATES FIRE INSURANCE COMPANY AND FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINTS

(Dated December 2, 1977)

Each of the four within actions has come on before the Court for hearing upon the following separate motions:

1. The motion of the defendant, United States Fire Insurance Company, for summary judgment.
2. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Moscovin, to strike the said motion for summary judgment of the defendant, United States Fire Insurance Company, from the file.
3. The motions of the plaintiffs and of Jon Allen Moscovin and Amelia C. Moscovin for summary judgment.
4. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, for

leave to file amended and supplemental complaints against United States Fire Insurance Company.

5. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, to add Robert W. Vogt as an additional party defendant and to file amended and supplemental complaints and/or a cross-claim against him.

The aforesaid motions came before the Court on the pleadings, the stipulations, affidavits, memoranda and oral arguments of counsel, and the Court, upon consideration, finds the motion for summary judgment of the defendant, United States Fire Insurance Company, well taken and grants the same and hereby and herewith enters final judgment in each of the four within actions in favor of the defendant, United States Fire Insurance Company, and against the plaintiffs and the defendants, Jon Allen Muscovin and Amelia C. Muscovin, at the costs of the plaintiffs, and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin.

The Court further finds each and every one of the remaining aforesaid motions not well taken, and each and every one of the remaining aforesaid motions is hereby and herewith overruled.

Appropriate exceptions are reserved to the parties.

APPENDIX S

OHIO CIVIL RULE NO. 38

RULE 38. Jury trial of right

(A) Right preserved. The right to trial by jury shall be preserved to the parties inviolate.

(B) Demand. Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. Unless the demand specifies a lesser number the jury shall be composed of twelve members. In the event of timely demand by more than one party the jury shall be composed of the greater number not to exceed twelve.

(C) Specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(D) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

OHIO CIVIL RULE NO. 39

Rule 39. Trial by jury or by the court

(A) By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

(B) By the court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(C) Advisory jury and trial by consent. In all actions not triable of right by a jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with the consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.

APPENDIX T

OHIO CIVIL RULE NO. 54

RULE 54. Judgments; costs

(A) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a referee or the record of prior proceedings.

(B) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(C) Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled; however, a demand for judgment which seeks a judgment for money shall limit the claimant to the sum claimed in the demand unless he amends his demand not later than seven days before the commencement of the trial. Additional service of process is not necessary upon such amendment.

(D) Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

APPENDIX U

EXCERPT FROM MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL AND TO VACATE JUDGMENTS IN THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO

The 14th Amendment to the U. S. Constitution guarantees to a citizen of the United States and of the state wherein he resides "due process of law".

The right to present every fact and argument in the case before a judgment entry is entered has been sustained by the Courts of this state.

In *Kaufman* v. *Shauer,* 121 Ohio St. 478, 481, the Supreme Court stated that a Court should:

> "Afford to the parties an opportunity, by further pleading, or by further evidence to do that which at the end of every trial they are presumed to have done, that is, to have pleaded such facts and introduced at the trial such evidence as they are able to regard as necessary and pertinent to an understanding and determination of the controversy."

Other cases to the same effect that a Court must allow a party at all times to reopen a case so as to present all the evidence are *Martin* v. *Hoffstetter,* 36 Oh. L. Abs. 10 (Court of Appeals Franklin County) and *Allen* v. *Toth,* 22 O. L. Abs. 457, 460 (Court of Appeals) Montgomery County wherein the Court held:

> ". . . in the interest of justice, further opportunity should be given to the defendants to present evidence which was considered material to the issue".

The Supreme Court of the United States has held that the failure to allow a party to present all his evidence and arguments constitutes a lack of due process and is unconstitutional. Thus, in the *New England Divisions Case,* 261 U.S. 185, 200 the Court defined a due process hearing under the constitution to be:

> "A full hearing is one in which *ample opportunity* is afforded to all parties to make, *by evidence and argument,* a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

Likewise, in *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, it was held that a party is entitled to a full hearing under the Constitution regardless of the fact that the party had no defense to the case. Thus, the Syllabus in this case is as follows:

> "One protesting against his property being taken without due process of law cannot be denied such process on the ground that due process would lead to the same result as he had no defense on the merits."

In *Armstrong* v. *Manzo,* 380 U.S. 545, it was held to be a violation of "due process" under the U. S. Constitution for a state court in adoption proceedings to make a finding without notice to the father that he failed to support the child for two years and therefore his consent was not necessary to issue a decree of adoption. The fact that the state court later gave him a hearing on his motion to set aside the decree did not remove the prejudice arising from the fact that the Court had already determined the case without a hearing. This is the situation analogous to the case at bar and the following reasoning of the Supreme Court on P. 551 is particularly appropos:

> ". . . the petitioner was faced on his first appearance in the court room with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. . . . The burdens placed on the petitioner were real, not purely theoretical."
>
> "A fundamental requirement of due process is the opportunity to be heard.: *Grannis* v. *Ordean,* 234 U.S. 385, 395. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

APPENDIX V

EXCERPT FROM PLAINTIFFS' REPLY MEMORANDUM IN THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO ON REMAND BEFORE JUDGE FRANK M. GUSWEILER

It is well establsihed law that any proceedings before a Court which lacks jurisdiction, either because it had no power to entertain the proceedings or because it entertained the proceedings in an unconstitutional manner, such as thte denial of due process, are void and of no effect whatsoever. [THE TRIAL COURT MUST NOT FOLLOW AN UNCONSTITUTIONAL REMAND]* No Court is required to and has a duty to refuse to follow such judgment or decision. Authorities to this effect have previously been presented by the Plaintiffs in their original Memorandum. There are many others which permit a collateral attack on such judgments.

---

* The bracketed material was written in the margin.

In *Ex Parte Siebold,* 100 U.S. 371, the Supreme Court of the United States agreed that an unconstitutional judgment can be inquired into at any time. Thus, the syllabus of this case are as follows:

> "1. The appellate jurisdiction of this court, exercisible by the writ of habeas corpus, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not.
>
> 2. The jurisdiction of this court by habeas corpus, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act."

The famous case of *Miranda* v. *Arizona,* 384 U.S. 436, is an example of proceedings which are void and of no effect because of the failure of police officers to advise the accused of his constitutional right to counsel before interrogation.

The Supreme Court of California held *In Re Klor,* 51 Cal. Rap. 903, 415 Pac. (2d) 791, a conviction based on an unconstitutional charge to the jury was subject to collateral attack. In *Gallagher* v. *Maxwell,* 175 Oh. St. 440, the Supreme Court of Ohio held that collateral attack in the form of habeas corpus lies to test whether there has been a waiver of trial by jury in a criminal case. The reason is that a court is entitled to entertain jurisdiction in such cases because constitutional rights are involved which could render the judgment void.

If the decision of the Court of Appeals is as contended by the Defendant, namely that the Plaintiffs are not entitled to a trial by jury as demanded by them nor the right to present evidence at such trial, then such decision of the Court of Appeals would partake of the same error which it condemned in the trial court, which was that the Plaintiffs have been deprived of "substantial rights", "due process" and of "their day in Court" (*pp. 7, 10 Opinion of the Court of Appeals*). Such a decision should not be followed by the Trial Court to which the case was remanded. [OBLIGATION TO FOLLOW U.S. CONSTITUTION][*] In fact, it is the duty of the Trial Court not to follow such decision, if the decision of the Court of Appeals in this case stands for what the Defendant contends, in view of *Article 6 of the United States Constitution* which expressly provides that the Constitution and the Laws of the United States are the Supreme Law of the land, which the judges in every state are bound to follow. The exact language is as follows:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, Anything in the Constitution or Laws of any State to the Contrary notwithstanding."

---

[*] The bracketed material was written in the margin.

APPENDIX W

EXCERPTS FROM REPLY BRIEF OF PETITIONERS IN THE COURT OF APPEALS FIRST APPELLATE DISTRICT OF OHIO ON THE SECOND APPEAL

It was pointed out in the Brief of the Plaintiffs on the appeal from the judgment entered by Judge Matthews that the proceedings were in violation of the constitutional rights of the Plaintiffs, namely *Article 1, Sects. 5 and 16 of the Ohio Constitution* and of the *Fourteenth Amendment to the United States Constitution.* Plaintiffs cannot agree with the Defendant that no such hearing was necessary because the result would have been the same, even if a hearing had been granted.

In point, the Supreme Court of the United States has held that the failure to allow a party to present all his evidence and arguments constitute a lack of due process and is unconstitutional. In the *New England Divisions Case,* 261 U.S. 185, 200 the Court defined a due process hearing under the constitution to be:

> "A full hearing is one in which *ample opportunity* is afforded to all parties to make, *by evidence and argument,* a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." (Emphasis Ours)

Plaintiffs, therefore, submit that neither Judge Matthews, the original trial court, nor this court had a right to determine these cases without an evidentiary hearing. The argument that "the law of the case" precluded Judge Gusweiler from considering the Affidavits of the English scholars because of some language in the Court's decision which is in violation of the constitutional rights of the Plaintiffs, and has no legal meaning or effect, doesn't govern this case.

It is well established law that any proceedings before a Court which lacks jurisdiction, either because it had no power to entertain the proceedings or because it entertained the proceedings in an unconstitutional manner, such as the denial of due process, are void and of no effect whatsoever. No Court is required to and has a duty to refuse to follow such judgment or decision. In *Ex Parte Siebold,* 100 U.S. 371, the Supreme Court of the United States agreed that an unconstitutional judgment can be inquired into at any time.

It is difficult for counsel for the Plaintiffs to conclude that the Court of Appeals, by its prior decision, held that the Plaintiffs were not entitled to a trial by jury as determined by them, nor entitled to present evidence at such trial. If so, then such decision of the Court of Appeals would partake of the same error which it condemned in the trial court, which was that the Plaintiffs have been deprived of "substantial rights," "due process" and of "their day in Court" (pp. 7, 10 *Opinion of the Court of Appeals*). The Court of Appeals, as previously set forth, clearly indicated the violation of substantial rights of the Plaintiffs, and the fact that it did not know what kind of evidence they might present at the trial court level, which should be sufficient reason to preclude it from pre-judging the case and making a decision until after the cases had had the benefit of hearings before the trial court. In any event, the trial court was bound by Article 6 of the *United States Constitution* which expressly provides that the Constitution and the Laws of the United States are the Supreme Law of the land, which the judges in every state are bound to follow. The exact language is as follows:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

It was, therefore, the responsibility of the trial court to make an independent determination as to what the evidence would disclose, and to accord the Plaintiffs the right to present such evidence in support of their claims and in accord with "due process".

APPENDIX X

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-232481, A-235384, A-235385, A-236200

HENRY NEUHAUSSER, Administrator, et al.,
Plaintiffs,

v.

JON ALAN MUSCOVIN, et al.,
Defendants.

AFFIDAVIT

Siegmund A. E. Betz, being first duly sworn states that he is Professor of English and Chairman of the Department of English at Edgecliff College, Cincinnati, Ohio, and that he is a Doctor of Philosphy and that he examined the policy of automobile insurance issued by the United States Fire Insurance Company to Alfred J. Muskovin and Amelia C. Muskovin, which is Policy No. FAC51 59 74, which includes the following portion of the policy:

"Persons Insured. The following are insureds under Part 1:

(a) with respect to the owned automobile,

  (1) the named insured and any resident of the same household,

  (2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

  (3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a)(1) or (2) above.

(b) with respect to a non-owned automobile,

  (1) the named insured,

  (2) any relative, but only with respect to a private passenger automobile or trailer,

  provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

  (3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b)(1) or (2) above."

Affiant states that it is his opinion that the portion of the policy with respect to "a non-owned automobile" which appears in (b) (2) commencing on the third line and which is as follows:

> "Provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission."

has reference to (b) (2) and does not refer to (b) (1). It relates to the operation of a non-owned automobile by a relative so as to require a relative operating such non-owned automobile to have the permission of the owner in order to be classified as a "person insured."

In other words, the language requiring permission of the owner does not have any reference with respect to (b) (1):

> "The named insured"

The named insured is not under the language of this provision of the policy required to have the permission of the owner of the automobile which is non-owned in order to be a "person insured."

The principles which govern the grammatical construction and the interpretation of the language of this clause is the policy are agreed upon by English grammarians. The rules for such construction are authoritatively set forth in *H. W. Fowler: a Dictionary of Modern English Usage (1965 Edition)*, a copy of the pertinent parts of which are attached to this Affidavit. The principles enunciated by *Fowler* with reference to the construction of language and the proper usage thereof under the heading of "Pronouns" (P. 481) are:

> "(1) The principal should not be very far off.
> (2) There should not be two parties justifying even a momentary doubt about which the pronoun represents.
> (3) One pronoun should not represent two principals on one occasion."

According to this authority with which said Affiant fully agrees it is clear that the clause "provided his actual operation – is with the permission – of the owner," in the case of a non-owned automobile relates to the second classification, namely the use of the automobile by a relative and not to "the named insured."

The singular pronoun "his" in the "provided" clause must, necessarily relate to the closest principal, which is "any relative," (b) (2). In the language under construction, the pronoun "his" cannot represent two principals, being singular so that it does not relate to the named insured (b) (1).

/s/ SIEGMUND A. E. BETZ

Sworn to before me and subscribed in my present this 18th day of December, 1975.

/s/ HYMAN B. ROSEN
Notary Public State of Ohio

ATTACHMENT

[EXCERPTS FROM PAGES 481, 482 OF H. W. FOWLER: A DICTIONARY OF MODERN ENGLISH USAGE (1965 Edition)]

pronouns and pronominal adjectives are tricky rather than difficult. Those who go wrong over them do so from heedlessness, and will mostly plead guilty when they are charged. It is enough to state the dangers very shortly, and prove their existence by sufficient citations. 1. There must be a principal in existence for the pronoun or proxy to act for. 2. The principal should not be very far off. 3. There should not be two parties justifying even a momentary doubt about which the pronoun represents. 4. One pronoun should not represent two principals on one occasion. 5. The pronoun should seldom precede its principal.

1. No pronoun without a principal is being. *Viscount Wolverhampton, acting under medical advice, has resigned the office of Lord President, and His Majesty the King has been pleased to accept* it (*it* is resignation; but as that word has

not been used we can only suppose H.M. to have accepted the office)./*Now, the public interest is that coal should be cheap and abundant, and that it should be got without the dangerous friction which has attended the disputes between masters and men in this trade. And, if nationalization is to be the policy,* it *looks to an assured peace in the coal-trade as its main advantage. For this* it *will pay a fair price and be willing that a considerable experiment should be made, but without the sure prospect of such a peace* it *will see no benefit to itself and a very doubtful benefit to the miners in the change from private to State ownership* (Each of the *its* in roman type means the public, not the public interest)./*The number of these abstainers is certainly greater than can be attributed to merely local or personal causes, and those who have watched the election agree that a portion of* them *are due to doubts and uncertainties about the Act* (A portion, that is, of the abstentions, not of the abstainers)./*An American Navy League Branch has even been established in London, and is influentially supported by* their *countrymen in this city* (Whose countrymen?).

2. The principal should not be very far off. We have to go further back than the beginning of the following extracts to learn who *he* and *she* are: *And yet, as we read the pages of the book, we feel that a work written when the story is only as yet half told, amid the turmoil of the events which* he *is describing, can only be taken as a provisional impression./It is always a shock to find that there are still writers who regard the war from the standpoint of the sentimentalist. It is true that this story comes from America and bears the traces of its distance from the field of action. But even distance cannot wholly excuse such an exterior view as* she *permits herself.*

3. There should not be two parties justifying even a moment's doubt about which the pronoun represents. *There is no doubt that the Home Secretary is justified in law in issuing a deportation order and therewith goes the rights, absolutely within his discretion, to place him in a ship or an aircraft* *bound for a destination of* his *selection* (The Home Secretary's selection or the deportee's?). *In the December previous to his raid on the Tower he was chief of a gang who, overpowering* his *attendants, seized the Duke of Ormonde in St. James Street when returning from a dinner-party* (His refers not to the preceding *he*, but to the following *Duke;* see 5, and FALSE SCENT)./*Professor Geddes's fine example of sociology applied to Civics, his plea for a comprehensive and exact survey of* his *own city as a branch of natural history required for the culture of every instructed citizen* (The professor's own city? Ah, no; here comes, perhaps better late than never, the instucted citizen, the true principal)./*As it is, the short-sighted obstinacy of the bureaucracy has given* its *overwhelming strength to the revolution* (Not bureaucracy's, but revolution's, strength; see also 5)./*Coriolanus is the embodiment of a great noble; and the reiterated taunts which* he *hurls in play after play at the rabble only echo the general temper of the Renascence* (Not Coriolanus, but Shakespeare, is the hurler; the interloping of Coriolanus between Shakespeare and his proxy makes things difficult for the reader).

4. One pronoun, one job . . . *which opens up the bewildering question as to how far the Duma really represents the nation. The answer to this is far from solving the Russian riddle, but without answering* it it *is idle even to discuss* it (*It* represents, first, the bewildering question, secondly, the discussion of that riddle, and last, the riddle itself – which is not the same as the question)./*This local option in the amount of outdoor relief given under the Poor Law has always operated inequitably and been one of the greatest blots on the system; to extend* it *to the first great benefit under the Insurance Act will greatly lessen* its *usefulness* (*It* is the blot, but *its* is the Act's)./*Again, unconsciousness in the person himself of what he is about, or of what others think of him, is also a great heightener of the sense of absurdity;* it *makes* it *come the fuller home to us from his insensibility to* it (*It* is first the unconsciousness, secondly the sense of absurdity, and thirdly absurdity).

5. The pronoun should seldon precede its principal. *For Plato, being then about twenty-eight years old, had listened to the 'Apology' of Socrates; had heard from* them *all that* others *had heard or seen of his last hours* (had heard from others all that they had heard etc.)./*The old Liberal idea of cutting expenditure down to the bone, so that* his *money might fructify in the pocket* of the taxpayer, *had given place to the idea of . . .* (the taxpayer's money might fructify in his pocket)./*Both these lines of criticism are taken simultaneously in a message which* its *special correspondent sends from Laggan, in Alberta, to the* Daily Mail *this morning* (which the *D.M.* prints this morning from its correspondent etc.).

APPENDIX Y

SECTION 3929.06 O.R.C.

§ 3929.06 Insurance money applied to judgment. (GC § 9510-4)

Upon the recovery of a final judgment against any firm, person, or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, or for loss or damage to a person on account of bodily injury to his wife or minor child or children, if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest is entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment is not satisfied within thirty days after it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file a supplemental petition to the action in which said judgment was rendered, in which the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action.

Supreme Court, U.
FILED
JAN 7 1980
RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-911

EDWARD E. KOEHL, Administrator of the Estate of Carol E. Koehl, Deceased,
HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased,
HENRY NEUHAUSSER, RONALD ISON, EDNA ISON SCOTT, JOHN A. MUSCOVIN, aka JON A. MUSCOVIN, and AMELIA MUSCOVIN,
Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-911

EDWARD E. KOEHL, Administrator of the Estate of Carol E. Koehl, Deceased,
HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased,
HENRY NEUHAUSSER, RONALD ISON, EDNA ISON SCOTT, JOHN A. MUSCOVIN, aka JON A. MUSCOVIN, and AMELIA MUSCOVIN,
Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Is a constitutional issue, appropriate for consideration on the merits by the Supreme Court of the United States, presented where the decisions of the trial and appellate courts of the State of Ohio turned upon such concepts as the proper construction of the language of a policy of automobile liability insurance, a state's interpretation of the doctrine of "the law of the case" and the appealability or non-appealability of an order of a state's intermediate appellate court?

STATEMENT OF THE CASE

The Statement of the Case and Statement of Facts appearing on pages 7-12 of the Petition for a Writ of Certiorari is accepted, in part, by respondent. However, there are several significant errors and omissions which we will point out.

Common Pleas Court, First Time

Contrary to what is implied on page 7 of petitioners' brief, the stipulation entered into in the Hamilton County Common Pleas Court by all of the parties was not designated a "partial" stipulation. The word "stipulation" was entirely unmodified, and the language of that stipulation was entirely silent as to whether it did, or did not, contain all of the evidence necessary to determine whether the policy issued by United States Fire Insurance Company to the Muscovins covered the judgments previously rendered against Amelia Muscovin and Jon Allen Muscovin.

As far as respondent is concerned, the stipulation does contain all that any court would ever need to resolve, as a matter of law, the coverage issue: first, the acknowledgment of the total lack of permission to Jon Allen Muscovin to operate the Koehl automobile and, secondly, the language (including the pagination and indentation) of the U. S. Fire policy, which appears on page 10 of the petitioners' brief. As we will point out in some detail later in this brief, each and every court which has ever been called upon to interpret that policy format and language has ruled, as a matter of law, that the only possible construction which could be made was precisely that construction made by the courts below in the case at bar.

There is an implication, on pages 7, 8 and 11 of petitioners' brief, that Judge William R. Matthews of the Hamilton County Common Pleas Court rushed precipitously into a totally unexpected and unwarranted decision following the filing of the stipulation. In this connection, we point out that, after the stipulation had been filed and prior to the rendition of Judge Matthews' opinion, the parties filed briefs in support of their respective positions, our brief asserting precisely the same construction of the policy which was ultimately adopted by the court. The briefs of the other parties took precisely the opposite position, and without any suggestion that it would be necessary to resort to the reception of evidence in order to reach such a determination. It was our understanding at that time that the court was to pass to a consideration of the case as a matter of law if it felt that this was possible under the stipulated facts, and this is what Judge Matthews did.

It was only after the circulation of Judge Matthews' opinion that petitioners suddenly discovered that the determination of the coverage question needed some proceedings beyond what had been stipulated to and thoroughly briefed. One is tempted to suspect that the protestations for a need of a "hearing" and for "testimony" constituted an afterthought in the wake of Judge Matthews' decision.

Court Of Appeals Case No. C-73253, (First Appeal)

On page 8 of their brief, petitioners choose to omit any mention of the positions which they took in their first appeal to the First District Court of Appeals. That appeal was not confined to "due process" grounds. On the contrary, petitioners devoted as much, or more, of their briefing efforts to their claim that the U. S. Fire policy should have been construed by the Common Pleas Court, presumably as a matter of law and based upon the same stipulated facts, in a manner exactly opposite from that court's ruling. Among other arguments, petitioners contended that various established rules of English grammar required such an interpretation. Excerpts from "A Dictionary of Modern English Usage" were made an appendix to one of petitioners' briefs. However, it should be noted that, in none of the briefs filed in the first appeal to the Court of Appeals, did any of petitioners ever state that he had *evidence* to present to the Court of Common Pleas on the proper *construction* of the policy; nor did the petitioners set forth in any of those briefs any Assignment of Error which urged reversal because of a denial to allow testimony from grammarians.

Pursuant to Rule 12A of the Ohio Rules of Appellate Procedure (set forth in the footnote on page 24a of petitioners' brief), the First District Court of Appeals was required to pass upon all claimed errors, including the claimed error in policy construction. It did so by adopting the same construction of what it held to be the "unambiguous" language of the U. S. Fire policy which has been, and continues to be, unanimously followed by the cases cited on pages 16-17 hereof (12a-14a of petitioners' brief). Nevertheless, the Court of Appeals reversed and remanded, but only because petitioners contended (13a of petitioners' brief):

> ". . . that they have additional evidence beyond that stipulated, regarding *negotiations* surrounding the issuance of the insurance policy by U. S. Fire to the Muscovins." (emphasis supplied)

At least as they were then perceived by the Court of Appals, petitioners had *not* argued that they had ever intended to introduce evidence varying the policy's *construction,* only that they had evidence, in the words of the Court of Appeals, "varying the policy *language.*" (emphasis supplied)

The entry journalized by the Court of Appeals in Case No. C-73253 tracked the dual holdings in its opinion, specifically stating that (17a of petitioners' brief):

> ". . . we find the assignments of error relative to the trial court's construction of the disputed portions of the insurance policy issued by U.S. Fire to Amelia C. Muscovin and Jon Allen Muscovin have no merit and are overruled."

Filings were then made by petitioners which they have chosen not to print as one of the appendices to their brief in this Court, identically worded motions for reconsideration, one of which is Appendix A of this brief. In those motions, petitioners urged the Court of Appeals to strike portions of its decision and judgment, or to modify them (1a of respondent's brief):

> ". . . so as to include no determination as a matter of law that the language of the policy of the United States Fire Insurance Company, in the absence of modification by the agent or broker, excluded coverage of Jon Allen Muscovin, and his mother, Amelia Muscovin."

In the memoranda supporting the motions for reconsideration, petitioners suggested to the Court of Appeals, for the first time in any brief or memorandum, the possibility of expert testimony on grammatical construction (3a of Respondent's Brief). Petitioners also asserted the argument that all proceedings in the Common Pleas Court were "void" (3a of Respondent's Brief). The Court of Appeals overruled the motions for reconsideration (19a of petitioners' brief), after which petitioners, even though they clearly understood the ramifications of the limited remand by the Court of Appeals, elected not to attempt an appeal to the Supreme Court of Ohio, an appeal which could have set the stage for the invocation of the jurisdiction of this Court if the petitioners desired to assert to this Court that the limited remand by the Ohio Court of Appeals was, somehow, constitutionally invalid.

Common Pleas Court, Second Time

Beginning at page 8 of their brief, petitioners place great emphasis on the affidavits of the four grammarians. As initially worded, two of those affidavits demonstrated that the affiants had been given a completely inaccurate policy format to analyze, a matter of considerable importance in that the indentation of the exclusion language has been deemed a decisive consideration by several appellate courts. When this blunder was pointed out, additional affidavits from the grammarians were hastily filed. It was as if a highly touted medical expert had said that the presence of fever in the patient showed that he had a certain disease and then, when told that the patient did not have a fever, quickly proclaimed that the absence of fever led him to the same conclusion.

Petitioners are in error when, on page 8 of their brief, they imply that no other affidavits were filed in support of, or in opposition to, the cross motions for summary judgment. Appendix B hereof is the affidavit of the insured, Alfred J. Muscovin, filed by petitioners. It affirmatively establishes the exact opposite of what petitioners had told the Court of Appeals they were going to prove, if given the chance. What Mr. Muscovin said was that he definitely did *not* seek to secure some different kind of automobile liability coverage for his son, but specifically instructed the agent, Robert W. Vogt, to put the son on the parents' existing policy, that is, the policy which already contained the same standard exclusion which (like all automobile liability policies) requires the permission of the vehicle owner before extending coverage for the use of a non-owned vehicle (9a-11a of respondent's brief).

Appendix C hereof is an affidavit filed by respondent, that of Mr. Vogt, the salient points of which are that he did endorse the Muscovin policy to name the son as an additional operator; that this addition made the son "fully covered" in the sense that it provided him with as much protection as was possible under any kind of automobile liability policy; and that a non-owned automobile policy (a so-called "owner's policy") could have been written at that time but would have contained essentially the same exclusion as that which was in the Muscovin policy (12a-13a of respondent's brief).

Court of Appeals No. C-77839 (Second Appeal)

We believe that it is appropriate to make some mention of the rationale of the Court of Appeals' affirmance. That court emphasized its obligation in the previous appeal to pass upon the policy construction Assignment of Error presented to it by petitioners (24a of petitioner's brief). It also pointedly reminded petitioners of their failure to appeal the judgment in Case No. C-73253 (26a and 27a of petitioners' brief), thus making it clear that the judgment in that case had been a final, appealable order. Therefore, petitioners could have appealed that order to the Supreme Court of Ohio and, failing there, to this Court. However, they chose not to do so.

The opinion in Case No. C-77839 also held that, after the previous limited remand, the trial court was bound by the unappealed ruling on proper policy construction, in other words, that the doctrine of "the law of the case" controlled (27a of petitioners' brief).

Finally, the Court of Appeals specifically re-asserted its holding that respondent's position on the substantive policy construction issue was correct and that both Mrs. Muscovin and her son were subject to the exclusionary clause requiring the vehicle owner's permission (27a of petitioners' brief). Footnote 3 of its opinion reflected an awareness that, under Ohio case law on policy construction, (28a of petitioners' brief):

> ". . . the interpretation of a printed instrument often is exclusively for the court."

The same footnote also acknowledged that (27a of petitioners' brief):

> ". . . much authority exists justifying the original trial court's construction of the policy."

By dismissing petitioners' appeal and overruling their motion to certify, the Supreme Court of Ohio chose not to disturb any of the rulings of the First District Court of Appeals.

ARGUMENT

1. PETITIONERS' "DUE PROCESS" ARGUMENT

The arguments and authorities on pages 13-15 of petitioners' brief would have had validity, if at all, in petitioners' original and successful appeal to the First District Court of Appeals. To the extent it was conceivable that the reception of any evidence, or the need for some further hearing, could, by the wildest stretch of judicial imagination, have a bearing on the coverage issue, petitioners had their opportunity upon remand. The decisions of this Court cited by petitioners do not, even remotely, suggest that any of the proceedings in any of the courts below in the case at bar were "void," at least in the sense used by petitioners.

In *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915), a state statute permitted execution upon the property of a shareholder in order to satisfy a judgment against a corporation. This taking of the shareholder's property was accomplished without any sort of hearing at which he could be heard. Clearly, this is light years away from the present case, even as it is recounted by petitioners.

In *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), an adoption went forward to completion without any notice to the child's natural father, even though his whereabouts were known. This no notice/no service situation is one which bears no similarity to the case at bar.

2. PETITIONERS' "CLEARLY ERRONEOUS" ARGUMENT

On page 15 of their brief, petitioners contend that the Court of Appeals ignored error in the trial court because the "result" there was correct. We suggest that this is an unfair characterization of a court which did reverse at petitioners' behest (after which petitioners failed utterly to make good on their promise to produce evidence that the Muscovins had negotiated a policy with different provisions than the printed contract.) All that the Court of Appeals did was to respond, as it was required to do, to claims of error made by petitioners with respect to the substantive issue of policy construction.

At the same point in their brief, petitioners assert that the Ohio courts erred (in a constitutional sense, it is to be presumed) when they held that petitioners were required, at their peril, to appeal the decision of the First District Court of Appeals in the first appeal, Case No. C-73253. In other words, petitioners are apparently arguing that, having taken steps which required the Court of Appeals to make a determination on a question of substantive law and having obtained an undesired result in that quest, they could still have a second chance to start over, as it were, on that substantive issue. Put in more legalistic terms, petitioners contend that Ohio's implementation of the doctrine of "the law of the case" is violative of some provision of the Constitution of the United States.

No case so holding has been cited by petitioners. We have already distinguished the *Coe* and *Armstrong* decisions. The case of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), is another no service/no notice situation in no way similar to any issue in the present case. The case of *Ex parte Siebold,* 100 U.S. 371 (1879), involved a criminal conviction under an unconstitutional statute, a situation which makes it totally inapplicable to the case at bar.

On at least two occasions, this Court has been confronted with contentions that an issue under the Constitution of the United States was raised by a state's interpretation of its "law of the case" doctrine. In *King* v. *West Virginia,* 216 U.S. 92 (1910), it was specifically held that no such constitutional issue is presented. At page 100 of the opinion of Mr. Justice Holmes, the following appears:

> "The highest court of the state is the final judge of the powers conferred by the state laws in that regard."

The *King* opinion was followed in *Moss* v. *Rainey,* 239 U.S. 538 (1916). At pages 184 and 185 of the opinion, the Court says this:

> "It is contended that the decision upon the first appeal became the law of the case, and that by recalling that decision when considering the second appeal the court infringed upon the due process of law clause of the 14th Amendment. The contention must fail. There is nothing in that or any other clause of the 14th Amendment which prevents the state from permitting an appellate court to alter or correct its interlocutory decision upon a first appeal when the same case, with the same parties, comes before it again; and *whether this is permitted is a question of local law, upon which the decision of the highest court of that state is controlling here.*" (emphasis supplied)

It stands to reason that, if no Fourteenth Amendment due process issue is presented when one state does not apply a "law of case" doctrine, the same result obtains when a second state does apply that doctrine.

On page 16 of their brief, petitioners contend that, in the first appeal, the Court of Appeals had "no jurisdiction to affirm" the allegedly tainted result in the trial court. An examination of the opinion of the Court of Appeals (Appendix D of petitioners' brief) and of that court's entry (Appendix E thereof) fails to find the word "affirm" in either.

Moreover, assuming *arguendo* that the original proceedings in the Hamilton County Common Pleas Court were somehow "tainted," there is no suggestion of any such "due process" flaw in the manner in which the Court of Appeals addressed itself to the issues originally presented to it in the first appeal, Case No. C-73253. By its ruling in the second appeal, Case No. C-77839, the First District Court of Appeals made it clear that its previous ruling in the first appeal was an appealable order which could have formed the basis of appeals to the Ohio Supreme Court and, later if necessary, to this Court. The Supreme Court of Ohio had an opportunity to disagree with the Court of Appeals' understanding of what constituted a final appealable order, but it did not. Petitioners have not attempted to cite any case implying that a constitutional issue can be made out of a state's determination of what is, or what it not, an appealable order by an intermediate appellate court.

In fact, this Court has addressed itself to that very question and has answered it in the negative. In *John* v. *Paullin,* 231 U.S. 583 (1913), at page 585, Mr. Justice Van Devanter said this:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Shortly after this language, the following appears in the same opinion:

> "Besides, the mode of subjecting the judgments of the state's subordinate courts to review in its supreme court was a matter of local concern only, and not within the control of Congress."

The first of the two above excerpts from *John* was quoted with approval by Mr. Justice Stewart in the majority opinion in *Wolfe* v. *North Carolina,* 364 U.S. 177 (1960), at page 195.

All of the Ohio cases appearing on pages 16 and 17 of petitioners' brief were cited by them to the Supreme Court of Ohio, where they failed to impress that tribunal. We see no need to comment upon them any further in this brief.

The case of *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364 (1939), cited on page 17 of petitioners brief, is devoted exclusively to issues dealing with the 1938 method of review of decisions of the NLRB by the Circuit Courts of Appeal. The very first sentence in the Opinion of Mr. Chief Justice Hughes is this (page 365):

> "This case presents a question of the propriety of the action of the Circuit Court of Appeals in remanding a cause to the National Labor Relations Board for the purpose of setting aside its findings and order, and issuing proposed findings, and making its decision and order upon reconsideration."

Later (at page 374) the Chief Justice further refines that statement as follows:

> "The present controversy thus comes to the narrow point that, instead of setting aside the Board's findings and order, the court has allowed the Board itself to set them aside."

Nowhere in the 13 page opinion in *Ford Motor Co.* is there a single mention of any provision of the United States Constitution, or of any point which might be termed a constitutional issue. Nowhere does the opinion of Mr. Chief Justice Hughes remotely suggest any error in any action taken by any of the courts below in the present case, and the citation of the *Ford Motor Co.* case by petitioners betrays the proverty of their case in this Court.

3. PETITIONERS' "AFFIDAVITS" ARGUMENT

The first argument made by petitioners in this portion of their brief (pages 18 and 19 thereof) is another effort by them to have this Court intervene in another purely state law area, Ohio's "law of the case" doctrine.

If, as contended on page 18 of petitioners' brief, the First District Court of Appeals "disregarded the Ohio case law" on the interpretation of a prior unappealed appellate decision, it was for the Supreme Court of Ohio to set matters straight. To this end, petitioners cited to that court all of the Ohio cases which appear on page 19 of their brief in this Court, but that court was totally unimpressed, apparently relying on numerous other Ohio cases, much more in point and contrary to petitioners' arguments. Those cases include *State ex rel Potain* v. *Matthews,* 59 Ohio St. 2nd 29, 391 N.E.2nd 343 (1979); *Sheets* v. *Hodes,* 142 Ohio St. 559, 53 N.E.2nd 804 (1944), affirming 39 O.L.A. 492, 68 N.E.2nd 342 (App. 1943); *Trout* v. *Tipton,* 106 Ohio App. 537, 153 N.E.2nd 158 (1958); *Gottfried* v. *Yocum,* 72 O.L.A. 343, 133 N.E.2nd 389 (1953) M.C.O. 1/18/56; *Anderson* v. *Wolf,* 21 O.L.A. 86 (App. 1935); *Wells* v. *Anchor Cartage & Storage Co.,* 38 Ohio App. 358, 176 N.E. 680 (1930); and *Breuer* v. *Frank,* 3 O.N.P. (N.S.) 581 (Super. 1905), affirmed 74 Ohio St. 519 (1906).

The same comments can be made about petitioners' argument, on pages 19 and 20 of their brief, based upon Rule 54(B) of the Ohio Rules of Civil Procedure, an argument made for the first time in this Court and one which could properly have been addressed only to an Ohio court.

We are in complete agreement with petitioners' assertion, on page 20 of their brief, that the United States Constitution is controlling in state courts. We point out, however, that in the corresponding portion of their brief petitioners cite no authority suggesting any constitutional issue in the present case.

We now turn to petitioners' final argument, the contention that it was error, worthy of this Court's attention, for the Ohio courts not to have ruled in their favor, after the remand, because of the four grammarians' affidavits.

There are several answers to this argument, but before setting them forth we wish to correct several additional errors in petitioners' brief. One is the assertion (page 21 thereof) that Judge Matthews "precluded" petitioners from offering "such evidence" as the grammarians' affidavits. The fact of the matter is that petitioners never filed any writing with Judge Matthews mentioning grammarians prior to their notices of appeal from his decision.

The second error is petitioners' contention that, after remand, the trial court "disregarded" their affidavits. If, by this, petitioners mean that the trial court, either *sua sponte* or upon respondent's motion, struck the affidavits from the file, or made some written or oral statement to the effect that the affidavits would not be considered, they are completely in error. Just the opposite appears in the Record. Appendix D hereof is the letter opinion of Judge Frank M. Gusweiler sent out under date of October 12, 1977. Appendix E hereof is the order entered by him on December 2, 1977. Both refer, among other things, to "the affidavits" as being material considered by the court in coming to its decision (14a-18a of respondent's brief).

On the other hand, if petitioners mean that Judge Gusweiler "disregarded" the grammarians' affidavits because of very compelling legal reasons rendering them, as a matter of law, of no consequence, then they are entirely correct. Indeed, we assured the Ohio courts that, if factual evidence of policy construction were properly receivable in the case at bar, we could produce our grammarians' affidavits contrary to those offered by petitioners. This would force the court or a jury to select which four professors' version to believe. We said that, while perhaps there are flaws in the American system of justice, the last thing that it needs is to be turned over to squads of English professors.

However, for at least two very good reasons, such a choice was properly deemed unnecessary by the Hamilton County Common Pleas Court after remand. One such reason was the efficacy of the prior decision and limited remand of the Court of Appeals, a decision which petitioners could have appealed but did not. A second reason is the unanimous body of law which has construed the Muscovin policy format and language, as a matter of law, just as the Ohio courts have construed it in the case at bar. The leading decision is *Bright* v. *Ohio Casualty Insurance Company,* 444 F. 2d 1431 (6 Cir. 1971), a case decided under Ohio law. *Bright* holds that the policy language is *not* ambiguous and that, because of the format

and the language of the policy, the "provided" clause applies, as a matter of law, to "the named insured" as well as to "any relative."

The result in *Bright* has also been the result reached in every single other decision in which the same policy format and language has ever been construed. The cases arriving at this unequivocal result include *State Automobile Mutual Co.* v. *Williams,* 302 A.2d 627 (Md. 1973); *Downey* v. *Motor Vehicle Accident Indemnity Corp.,* 350 N.Y.S.2d 821 (App. Div. 1973); *Stevenson* v. *Comeaux,* 296 So.2d 267 (La. 1974); and *Bilstein* v. *Porter,* 548 P.2d 255 (Colo. App. 1976).

The substantive Ohio Law on insurance policy interpretation in situations where the language and format are unambiguous *requires* construction as a matter of law. This is the body of Ohio authority referred to by the First District Court of Appeals in Footnote 3 of its opinion in the second appeal, Case No. C-77839 (27a and 28a of Petitioner's Brief) and includes such decisions as *Garlick* v. *McFarland,* 159 Ohio St. 539, 113 N.E.2d 92 (1953); *Olmstead* v. *Lumberman's Mutual Insurance Company,* 22 Ohio St.2d 212, 259 N.E.2d 123 (1970); *Jirusek* v. *Prudential Insurance Co.,* 27 Ohio St.2d 62, 271 N.E.2d 866 (1971); *Motorists Mutual Insurance Co.* v. *Tomaski,* 27 Ohio St.2d 222, 271 N.E.2d 924 (1971); *Jackson* v. *Metropolitan Life Insurance Co.,* 34 Ohio St.2d 138, 296 N.E.2d 679 (1973); *Travelers Insurance Co.* v. *Reddick,* 37 Ohio St.2d 119, 308 N.E.2d 454 (1974); and *Alexander* v. *Buckeye Pipe Line Co.,* 53 Ohio St.2d 241, 374 N.E.2d 146 (1978).

When a provision in an insurance policy is subject to construction as a matter of law (as this one is in all of the jurisdictions which have ever been confronted with it), then there could never be any need to resort to testimony, expert or otherwise, to construe it (the "squads of English professors" situation). In *Home Insurance Co.* v. *Continental Insurance Co.,* 180 N.Y. 389, 73 N.E. 65 (1905), it was specifically held that, when the meaning of language in an insurance policy has been settled by the courts, the testimony of experts on the proper construction of the policy is inadmissible. This decision has been followed in such other cases as *McNally* v. *American States Insurance Co.,* 308 F.2d 438 (6 Cir. 1962); *Clifton Shirting Co.* v. *Bronne Shirt Co.,* 209 N.Y.S. 709 (App. Div. 1925); and *Keber Straw Hat Corp.* v. *Lincoln,* 239 App. Div. 727, 268 N.Y.S. 745 (1934).

Four sets of able, resourceful and persistent counsel for petitioners, all of them fiercely dedicated to finding some authority contrary to *Bright,* have had almost 13 years to find such a case but have failed to uncover a single authority to support their construction of the Muscovin policy. Given the unanimously followed construction of this provision and the Ohio rule on the construction of unambiguous insurance policy language, it would be obvious error for an Ohio court to receive "expert" testimony such as that suggested by petitioners on pages 23 and 24 of their brief. To put it another way: if this Court were to take jurisdiction on the merits and reverse and remand the case to the Hamilton County Common Pleas Court, is there some principle of constitutional law which would require that court to treat the policy construction issue as a question of fact (contrary to the *Bright* and *Olmstead* lines of cases), so as to submit the grammarians' testimony to a trier of the facts?

Petitioners have cited no authority so suggesting, and we submit that such an issue as the substantive law of insurance policy construction, both in general and with respect to the particular insurance policy involved in this

case, has always been, and remains, a matter which each state is free to determine for itself. The Congress, in enacting the McCarran-Ferguson Act, 15 U.S.C. #1011 et seq., specifically declared that the regulation of the insurance business by the several states was in the public interest and made the business of insurance subject to the laws of several states. This Court, in *Mutual Life Insurance Company of New York* v. *Johnson,* 293 U.S. 335 (1934), a pre *Erie* decision, specifically held that, in a matter of insurance policy construction, it saw fit to yield to the decisions of the state under whose law the contract of insurance would ordinarily be construed. This decision was subsequently followed by this Court in *Ruhlin* v. *New York Life Insurance Company,* 304 U.S. 202 (1938), in which it is held that questions arising in the federal courts concerning the proper construction of contracts of insurance are governed by the decisions of the appropriate state court.

In the Ohio courts, petitioners made the same argument which appears on page 22 of their brief in this Court, the insistence that some critical difference in policy construction is created by the employment of the pronoun "his" in one contract and the employment of the article "the" in the other. Obviously, the Ohio courts have rejected this assertion. In his *King* opinion Mr. Justice Holmes held that the claimed misconstruction of a state statute by a state court cannot present a question of which this Court should take cognizance. The same rationale would apply, we submit, to petitioners' "his" versus "the" argument.

CONCLUSION

We believe that the foregoing Argument portion of this brief has successfully demonstrated that this case does *not* present to this Court any "due process" or other constitutional issue over which it should assume on-the-merits jurisdiction. Rather, the issues which shaped the case at bar into its present posture are purely state-law issues, that is, those suggested in the Question Presented at the beginning of this brief.

We urge, therefore, that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT OF OHIO

No. C-73253

HENRY NEUHAUSSER, Administrator of the Estate of
Stephen Neuhausser, Deceased, et al.,
Plaintiffs-Appellants,

vs.

JON ALLEN MUSCOVIN, et al.,
Defendants-Appellees.

APPLICATION FOR RECONSIDERATION AND FOR MODIFICATION OF JUDGMENT ENTRY

(Filed October 21, 1975)

Come now Henry Neuhausser, Administrator of the Estate of Stephen Neuhausser, Deceased, Ronald Ison, Edna Ison Scott, and Edward E. Koehl, Administrator of the Estate of Carol E. Koehl, Deceased, Plaintiffs-Appellants, and make Application to the Court for reconsideration of the Decision and Judgment entered herein.

Said Plaintiffs-Appellants move that a portion of the Decision and Judgment of the Court be stricken and otherwise modified so as to include no determination as a matter of law that the language of the policy of the United States Fire Insurance Company, in the absence of modification by the agent or broker excluded coverage of Jon Allen Muscovin, and his mother, Amelia Muscovin. They also move that the Judgment Entry in this case be modified so as to conform to the Decision.

This Court having determined that the Plaintiffs-Appellants were unjustifiably denied a trial, the determination as to the legal effect of the insuring clause of the policy issued by the United States Fire Insurance Company, Defendant-Appellee, was not necessary, relevant, or proper for its Decision and Judgment and constitutes surplusage without binding legal effect.

....

WALTER BEALL, Attorney for
Henry Neuhausser, Admr., Plaintiff-Appellant

....

STANLEY M. CHESLEY, Attorney for
Ronald Ison and Edna Ison Scott,
Plaintiffs-Appellants

....

HYMAN B. ROSEN, Attorney for
Edward E. Koehl, Admr., Plaintiff-Appellant

ARGUMENT

Under *Article IV, Section 3 of the Ohio Constitution,* the Court of Appeals may affirm, reverse or modify, Judgments or Final Orders of inferior Courts. Also in *Article IV, Section 1, of the Ohio Constitution* there is a grant of "judicial power" to the Courts. "Judicial power" could not conceivably extend to the partial affirmance of the decision of a Court where no trial was had, as in this case.

By its Decision, the Court of Appeals has denied Plaintiffs-Appellants the right to present expert testimony and evidence on the grammatical construction and effect of the insuring clause as well as the rest of the policy. Thus, the Court of Appeals has withdrawn an issue of fact from determination in the Trial Court without any evidence to support its decision.

Such Decision of the Court of Appeals violates the rights of the Plaintiffs-Appellants, under *Article I, Section 5, and Article I, Section 15 of the Ohio Constitution and Article I of the 14th Amendment of the United States Constitution* and deprives them of "due process of law," which includes the right to a complete impartial hearing at which evidence can be presented and the issues argued on the basis of such evidence.

In view of the fact that the Decision found that the Plaintiff had been denied a right to a trial, all proceedings in the Trial Court were necessarily void. Therefore, this Court should not have attempted to pass on issues which relate to the merit of the cause. Such findings by the Court of Appeals on the merits does not constitute an exercise of "judicial power" on its part. As a matter of fact, such findings were irrelevant and not necessary to the Decision.

Plaintiffs have not submitted this case for a determination of substantial law or on its merits. The latter phase was argued in view of the position of the United States Fire Insurance Company that they were not entitled to a trial. In case this Court agreed with such position, Plaintiffs presented Arguments on substantial issues so that there would be no default on the part of the Plaintiffs. Reference is made to P. 4 of Plaintiffs' Reply Brief wherein their position is clearly stated:

> "While it is plaintiffs' position that the proceedings

> in the trial court are so irregular and in violation of the existing law and rights of the plaintiffs as to make the same void, and requires a reversal without a discussion of the substantive law involving the interpretation of the policy, nevertheless, since the matter has been raised in the brief counsel has argued the substantive law."

The Supreme Court of Ohio in *Middleport Woolen Mills Co.* v. *Titus,* 35 Oh. St. 253, 256, held that where the Supreme Court had affirmed the judgment of the Court of Appeals in reversing a judgment of the Trial Court on the ground of the weight of the evidence, the Supreme Court was not warranted and would not pass on other errors assigned which were not necessary to the Decision or Opinion. As a matter of fact, on P. 258 the Court stated:

> "The view that we have taken of this case renders it unnecessary that we should determine the important questions discussed by counsel, or express any opinion as to the real merits of this case in any particular."

The foregoing ruling of the Ohio Supreme Court was an affirmance of the law which has its inception in the earliest reported cases of our state. Thus, in *Stewart* v. *Southard,* 17 Oh. 402, 406, the Court held in discussing the limitations of "judicial power:"

> "It is our duty to decide such questions only as become necessary to ascertain the rights of the parties litigant and are legitimately presented upon the record and we cannot admit that parties have the power to call for a right not thus presented, and which is out of the case."

It is also well established that a Court cannot render an advisory opinion without a trial and affording parties the right to present evidence. In addition, a Court cannot by an advisory opinion determine what evidence is admissible or what procedure should be followed in the Trial Court. *U.S. Fidelity Ins. Co.* v. *Savoy Grill, Inc.,* 51 Oh. App. 504., *State ex rel. Reams* v. *McNary,* 54 Oh. App. 496.

There are other cases which hold that the Appellate Court should not render an Opinion on matters not before it, or which are not necessary for the Decision of the Court. Thus, in *Ford Motor Co.* v. *National Labor Relations Board, 305 U.S. 364,* the Supreme Court of the United States held that where there had been a lack of a full and fair hearing in the tribunal below which had not afforded the Petitioner an opportunity to be fully heard and to present his evidence, the tribunal on remand from the Supreme Court, must start anew and permit a full and complete trial of the entire issue. In this case the tribunal was the National Labor Relations Board.

It should also be considered that in the Narrative Statement of the Proceedings from the Trial Court in this case the Trial Court certified on P. 5 to this Court the following:

> "Counsel for the Plaintiffs and the Muskovins also stated to the Court that they had evidence to present to the Court, including expert testimony, and evidence relating to the interpretation of the policy and other evidence to show it was an operator's policy, not requiring consent of the owner of the Koehl vehicle."

In addition the Court further certified on P. 5

> "That he would not allow any party to present evidence."

It should thus be apparent that there was an issue of fact which related to the interpretation of the policy involved, recognized by both the Plaintiffs' and the Defendants' counsel. Counsel for the United States Fire Insurance Company in the exchange of correspondence with counsel for Koehl referred to an offer to the Trial Court to present expert testimony, and other evidence relating to the interpretation of the policy, so that the insurance company recognized that there was a bona fide factual issue on the matter.

There is ample law that the construction or interpretation of a policy or a contract many times is an issue of fact for the jury rather than for the Court. The general rule is that when the policy or contract is not in any way vague or capable of two constructions, then the construction or interpretation of the policy or contract is for the Court. On the other hand, where there is vagueness, ambiguity, or uncertainty concerning the language of the contract or policy, it then becomes an issue of fact for the jury. This is exactly the situation which existed before Judge Matthews in this case, as is apparent by the certification made by him to this Court of the contentions and offers by counsel on the hearing of their Motions to Set Cases for Trial. The rule of law referred to is well set forth in the case of *Amstutz, Admr.* v. *The Prudential Ins. Co. of America,* 135 Oh. St. 404, 408. We quote from page 408 of this Opinion

> "While it is the function of a court to construe a contract, it is the province of the jury to ascertain and determine the intent and meaning of the contracting parties in the use of uncertain or ambiguous language. By the use of the term 'instructions,' and particularly in the light of the testimony of Mr. Shindollar that 'Mr. Speiser, of course, could instruct him (Shultz) to do anything * * *,' the trial court was warranted in finding that a jury may reasonably infer from the evidence that appellant intended to reserve to itself the right to control the physical acts of Shultz as they relate to the instant case, and that, by reason thereof, there existed between the two the relationship of master and servant."

It is a well established rule of law that an expert may testify as to matters which are generally not within the knowledge of the jury, or which by the use of the expertise of the expert would better inform and assist the jury. The Rule, as is stated in *12 Oh. Jur. (2d 418 Sect. 410.)* sets forth the reason for the admission of the testimony of an expert is that: "He knows those things within the field of his specialty which the average man does not know." Also, it was stated in this same reference, that an expert should be permitted to testify because from the nature of his calling he is "better able to judge matters relating thereto than one not an expert." It must be admitted that the language of insurance policies generally is difficult for the layman to understand. It is even difficult in many cases for lawyers or judges to understand or interpret such policies. There can also be no argument that a man who is skilled in the English language, such as a Professor or a Grammarian is better able to interpret such language on the basis of grammatical interpretation and construction which is applied universally in construing the English language. Thus, the Court of Appeals, by its Opinion has denied the Plaintiffs the right to present such evidence which is not only competent but which is relevant to an important issue of fact.

Plaintiffs also request that the Judgment Entry of the Court of Appeals entered herein be modified, in view of the fact that the Court of Appeals in its Decision stated on Page 7: "The four cases are remanded to the Hamilton County Court of Common Pleas for further proceedings according to law which include Trial Settings upon the pending Supplemental Complaints filed by the Plaintiffs-Appellants." This finding is in conflict with the Judgment

Entry which states: "It is, therefore, Ordered by the Court that the four cases are remanded to the Hamilton County Court of Common Pleas for further proceedings according to law, which *may* include trial settings upon the pending Supplemental Complaints filed by the Plaintiffs-Appellants." It appears that the Judgment Entry and Decision are in conflict, since the Decision found that there was no trial accorded to the Plaintiffs, and therefore, they were entitled to a trial setting. On the other hand, the Entry makes it discretionary as to whether or not there should be any trial settings. Plaintiffs contend that the Entry should conform to the Decision.

It is, therefore, submitted by the Plaintiffs that the Decision and Judgment of the Court of Appeals in this case should be reconsidered and that they should be modified in accordance with the requested Application, argument, and authorities heretofore cited by the Plaintiffs.

Respectfully submitted,

....

WALTER BEALL,
Attorney for Henry Neuhausser,
Admr. Plaintiff-Appellant

....

STANLEY M. CHESLEY,
Attorney for Ronald Ison and
Edna Ison Scott, Plaintiffs-
Appellants

....

HYMAN B. ROSEN,
Attorney for Edward E. Koehl,
Admr. Plaintiff-Appellant

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX B

AFFIDAVIT

STATE OF OHIO)
) SS
HAMILTON COUNTY)

Alfred J. Muskovin, being first duly sworn deposes and says under oath that he resides at 112 Harrell Street, Greeneville, North Carolina, 27834, and that his profession is that of an Engineer with Proctor and Gamble Company. Prior to January 24, 1975 he resided at 6478 Teakwood Court, Cincinnati, Ohio.

Affiant further says that he is married to Amelia C. Muskovin and they are the parents of Jon Allen Muskovin. That prior to July 6, 1966 he was the insured in a policy of insurance issued by the United States Fire Insurance Company to himself and his wife Amelia C. Muskovin, which is Policy Number FAC51 59 74 which was an automobile insurance policy which covered bodily injury liability, property damage liability, and which had other coverages thereon. The automobile primarily insured by this policy was a 1965 Oldsmobile F-85 4-Door Deluxe automobile, which was Mr. Muskovin's car.

Affiant states that in August of 1962 he removed to Cincinnati from Twinlake, Michigan and prior thereto he had been advised to contact Robert W. Vogt, an insurance broker in Cincinnati for the purpose of covering all of his needs of insurance. As a result thereof, he promptly contacted Mr. Vogt and until the time he removed to Greeneville, North Carolina, Mr. Vogt wrote all the insurance, other than life insurance, which he required. He wrote the Homeowner's Policy and he wrote the insurance policy on his automobile. During the minority of his older daughter, Marie, who was approximately three years older than his son Jon, Mr. Vogt had covered her in the policy of insurance which he had written to the Muskovins. However, at the time of the accident involved on January 26, 1967, Marie was a student at the College of Nursing at the University of Cincinnati, lived on the campus, had her own automobile and was not an insured under the policy of her parents.

On July 5, 1966, Affiant remembers a telephone conversation with the secretary of Mr. Vogt, whom he knew by the name of Mary Lou. During the years that he dealt with Robert Vogt, he had met Mr. Vogt on one occasion, although he had had many telephone conversations with him, and in most cases he had referred him to his secretary, Mary Lou, for service. As a result, he got to know Mary Lou very well, knew her voice and she was the person with whom he talked on July 5, 1966 in regards to the coverage of his son, Jon Allen Muskovin on his automobile insurance policy. On that occasion, he called the Vogt Agency and he spoke to Mary Lou. He told Mary Lou that his son Jon Allen had reached the age of sixteen and had received a driver's license. As he best recollects, he states that his conversation with Mary Lou consisted of his statement to her: "I need insurance coverage for Jon, my son, because he now has a driver's license, and I want him fully covered." Mary Lou then told the Affiant what the charge would be for covering him, on Mr. Muskovin's policy, and Affiant told her to go ahead and do so, and Mary Lou stated that he would be covered immediately. Thereafter an endorsement was made on the policy of insurance previously referred to which had been issued to Mr. and Mrs. Alfred J. Muskovin, which was effective on July 5, 1966 and which purported to cover

"Jon Allen Muskovin as "added operator". This endorsement was signed by Mr. Vogt.

It was the understanding of Mr. Alfred J. Muskovin that he was purchasing insurance which would fully cover his son, Jon Allen Muskovin, and at the same time cover himself and his wife as parents of their son. He had asked for coverage for his son, Jon Allen, and he understood he was getting such coverage which would protect his son and him and his wife at all times while he was operating an automobile during his minority.

Affiant states that he believed that he and his wife and his son should be covered by insurance, and at the same time he wanted to protect the public against the operation of an automobile by his son by having insurance. Otherwise, there would have been no purpose in obtaining insurance for his son who was not financially responsible in the event of an accident. He was thus motivated by what he thought was a legal and moral responsibility. Affiant was accordingly very much amazed when he was advised after the accident that the United States Insurance Company had determined the policy did not cover the accident.

/s/ ALFRED J. MUSKOVIN

Sworn to before me and subscribed in my presence this 16th day of January, 1976.

/s/ HYMAN B. ROSEN,

NOTARY PUBLIC
STATE OF OHIO

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-232481, A-235284, A-235385, A-236200

HENRY NEUHAUSSER, Administrator of the
Estate of Stephen Neuhausser, Deceased, et al.

Plaintiffs,

v.

JON ALLEN MUSCOVIN, et al.,

Defendants.

AFFIDAVIT OF ROBERT W. VOGT

(Filed August 22, 1977)

STATE OF OHIO)
) SS
HAMILTON COUNTY)

ROBERT W. VOGT, being first duly cautioned and sworn, deposes and says that he is the insurance agent who, at various times during the period in which Mr. Alfred J. Muskovin and his family resided in the Cincinnati area, wrote various policies on him and members of his family.

Affiant further says that he is the Robert W. Vogt referred to in the affidavit of Alfred J. Muskovin recently filed in the within actions.

Affiant further says that he has no personal knowledge of the telephone conversation allegedly had between Mr. Muskovin and an employee of the affiant on July 6, 1966; but that as a result of some contact of the affiant's office by Mr. Muskovin at or about that time, the existing insurance coverage on Alfred J. and Amelia C. Muskovin was endorsed so as to include Jon Allen Muskovin as an added operator.

Affiant further says that, to the knowledge of the affiant as of both 1966 and the present time, the addition of Jon Allen Muskovin as an added operator on his parents' automobile liability insurance policy "fully covered" Jon Allen Muskovin in the sense that it provided him with as much protection as was possible under any kind of automobile liability insurance policy.

Affiant further says that if a non-owned automobile policy or a so-called "operator's policy" could have been written at that time, such a policy would have contained an exclusion to the effect that coverage was denied to the insured while he was operating a motor vehicle without the permission of the owner of that motor vehicle, in other words, an exclusion containing essentially the same language as that which did appear in the automobile liability insurance policy issued to the parents of Jon Allan Muscovin.

Further affiant saith naught

....

Robert W. Vogt

Sworn to before me and subscribed in my presence this day of August, 1977.

....

Notary Public

APPENDIX D

[LETTERHEAD OF HAMILTON COUNTY
COURT OF COMMON PLEAS]

October 12, 1977

Mr. Hyman B. Rosen
Attorney for Plaintiff
Edward E. Koehl, Administrator
Rosen and Rosen
1005 First National Bank Building
Cincinnati, OH 45202

Mr. James L. O'Connell
Attorney for Defendant
United States Fire Insurance Co.
Lindhorst & Dreidame
1200 American Building
Cincinnati, OH 45202

Mr. Russell W. Renner
Attorney for Defendants
John A. and Amelia C. Muskovin
Wesselman & Renner
3526 Glenmore Ave.
Cincinnati, OH 45211.

**Re: Henry Neuhausser, Administrator, et al. vs.
John A. Muskovin, etc., et al.
Nos. A-232481, A-235384, A-235385,
A-236200**

Gentlemen:

The four above cases having been consolidated, this matter is before the court on a motion for summary judgment in behalf of the defendant United States Fire Insurance

Co., and various other motions on behalf of the plaintiffs and other defendants.

After oral arguments and a review of the pleadings, together with the affidavits, briefs and authorities submitted, this court is of the opinion that the motion for summary judgment by the defendant (United States Fire Insurance Co.) is well taken and grants same. All other motions, i.e., to strike, to amend and to add defendant are hereby denied.

You may present appropriate entries.

Very truly yours,

/s/ FRANK M. GUSWEILER
Frank M. Gusweiler, Judge

FMG:jh

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-232481, A-235284, A-235385, A-236200

HENRY NEUHAUSSER, Administrator of the
Estate of Stephen Neuhausser, Deceased, et al.

Plaintiffs,

v.

JON ALLAN MUSCOVIN, et al.,

Defendants.

ENTRY GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT UNITED STATES FIRE INSURANCE COMPANY, AND OVERRULING MOTIONS OF PLAINTIFFS AND OF DEFENDANTS JON ALLEN MUSCOVIN AND AMELIA MUSCOVIN FOR SUMMARY JUDGMENT, TO STRIKE MOTION FOR SUMMARY JUDGMENT OF UNITED STATES FIRE INSURANCE COMPANY AND FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINTS

(Filed December 2, 1977)

Each of the four within actions has come on before the Court for hearing upon the following separate motions:

1. The motion of the defendant, United States Fire Insurance Company, for summary judgment.
2. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, to strike the said motion for summary judgment of the defendant, United States Fire Insurance Company, from the file.
3. The motions of the plaintiffs and of Jon Allen Muscovin and Amelia C. Muscovin for summary judgment.
4. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, for leave to file amended and supplemental complaints against United States Fire Insurance Company.
5. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, to add Robert W. Vogt as an additional party defendant and to file amended and supplemental complaints and/or a cross-claim against him.

The aforesaid motions came before the Court on the pleadings, the stipulations, affidavits, memoranda and oral arguments of counsel, and the Court, upon consideration, finds the motion for summary judgment of the defendant, United States Fire Insurance Company, well taken and grants the same and hereby and herewith enters final judgment in each of the four within actions in favor of the defendant, United States Fire Insurance Company, and against the plaintiffs and the defendants, Jon Allen Muscovin and Amelia C. Muscovin, at the costs of the plaintiffs, and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin.

The Court further finds each and every one of the remaining aforesaid motions not well taken, and each and every one of the remaining aforesaid motions is hereby and herewith overruled.

Appropriate exceptions are reserved to the parties.

....

/s/ STANLEY M. CHESLEY
Attorney for Ison

/s/ WALTER C. BEALL
Attorney for Neuhausser

/s/ RUSSELL W. RENNER
Attorney for Jon Allan Muscovin
and Amelia Muscovin

/s/ HYMAN B. ROSEN
Attorney for Edward E. Koehl,
Administrator of Carol E. Koehl

/s/ James L. O'Connell
Attorney for deft. U. S. Fire

Supreme Court, U. S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-911

EDWARD E. KOEHL, Administrator of the Estate of Carol E. Koehl, Deceased,
HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased,
HENRY NEUHAUSSER, RONALD ISON, EDNA ISON SCOTT, JOHN A. MUSCOVIN, aka JON A. MUSCOVIN, and AMELIA MUSCOVIN,

Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-911

EDWARD E. KOHL, Administrator of the Estate of
Carol E. Koehl, Deceased, et al.,
Petitioners,

vs.

UNITED STATES FIRE INSURANCE COMPANY,
Respondent.

REPLY BRIEF OF PETITIONERS

STATE COURTS MAY NOT INVOKE THE THEORY OF "JUDICIAL DISCIPLINE" OR THE "LAW OF THE CASE RULE" TO DENY PETITIONERS THE RIGHT TO "DUE PROCESS".

Article 6 – The Supremacy Clause Of The United States Constitution Guarantees "Due Process" To A Litigant In A State Court.

In spite of the rather complex facts in this case made necessary by litigation over a period of thirteen years, the issue is clear and concise. The issue raised is the important Constitutional question as to the applicability of the Supremacy Clause of the United States Constitution to state courts. May state courts deny a person "due process of law" by resort to the theory of "judicial discipline" or the "law of the case"?

Petitioners contend that they have a right to "due process" in the state courts, and the Respondent, in effect, says that such rights may be denied because the Trial Court is duty bound to follow the orders of the remand of the State Court of Appeals which is clearly erroneous. In addition, the Court of Appeals cannot extricate itself from its prior erroneous judgment because of the resort to the "law of the case" theory.

There is much to be said for both contentions. It cannot be disputed that there is a great necessity for the applicability of the theory of "judicial discipline". However, such theory assumes that the courts will act properly, or at least within their jurisdiction.

Clearly, in this case the State Trial Court on two occasions, the Court of Appeals on two occasions, and the Supreme Court of the State exceeded their jurisdiction by rendering judgments not based on "due process". In spite of the attempt by Respondent to re-argue the facts, the findings of the Ohio Court of Appeals are clear – that the Trial Court did not accord the Petitioners "due process".

It must also be evident that the Appellate Courts by affirming the judgments of the Trial Court rendered without "due process" were likewise guilty of denying the same Constitutional rights to the Petitioners. This is all there is to the case. The attempt by the Respondent to justify the decisions of the State Courts on the merits is not relevant because such decisions were obiter dictum and beyond the jurisdiction of the State Appellate Courts.

Petitioners were entitled to a trial which was denied to them and the State Court of Appeals so found. The issue must not be confused by the fact that on appeal Petitioners presented their case in the alternative on the merits which is permitted under Ohio law.

Also, the Affidavits of the Respondent before the State Trial Court after remand related only to the issue as to whether or not the insurance policy had been varied by the oral representations of Respondent's insurance agent.

The law is quite clear. The Constitution of the United States, and not the decisions of the State Courts prevail, *Pennekamp* v. *Florida*, 328 U.S. 331, 345; *Henry* v. *City of Rock Hill*, 376 U.S. 776.

Respectfully submitted,

ROSEN AND ROSEN
BY: HYMAN B. ROSEN
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Carol E. Koehl, Deceased

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